SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 371

GAYNOR NEWS COMPANY, INC., PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAR. 19, 1953.

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

GAYNOR NEWS COMPANY, INC., Respondent

Appendix To Brief For Petitioner

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.—February 19, 1952

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Gaynor News Company, Inc. and Sheldon A. Loner and Newspaper & Mail Deliverers' Union of New York and Vicinity, Party to the Contract, Case No. 2-CA-605."

In support of this petition the Board respectfully shows:

(1) Respondent is a New York corporation engaged in business in the State of New York, within this judicial [fol. 2] circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on February 16, 1951, duly stated its findings of fact and conclusions

of law, and issued an order directed to the Respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any terms or condition of employment of any of its employees because of their nonmembership in such organization, or by any like or related conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organiza- [fol. 3] tion, to join labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

(d) Recognizing Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of its employees for the purposes of dealing with the Respondent con- [fol. 4] cerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Sheldon A. Loner and all other non-union employees, who were similarly situated, for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the Intermediate Report in the section entitled "The remedy."

(b) Withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this order.

(d) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked Appendix [fol. 5] A.[7] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

(3) On February 16, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and tran- [fol. 6] script to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board; and requiring Respondent,

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[7] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "A Decree of the United States Court of Appeals Enforcing."

and its officers, agents, successors, and assigns to comply therewith.

National Labor Relations Board, By (S.) A. Norman Somers, Assistant General Counsel.

Dated at Washington, D. C. this 19th day of February 1952.

Appendix A

Notice to all Employees

Purusant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not encourage membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of our employees, by discriminating in regard to their hire and tenure of employment, or any term or condition of employment of any of our employees because of their non-membership in such organization.

[fol. 7] We will not enter into, renew, or continue in force and effect any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization, as a condition of employment or continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join, assist, or form any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or

to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We will withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as a representative of any of our employees for the purposes of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified by the National Labor Relations Board.

[fol. 8] We will cease performing or giving effect to our contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said organization shall have been certified by the National Labor Relations Board.

We will make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated, for any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc. (Employer)

Dated — — By (Representative, (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 9] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-CA-605.

In the Matter of GAYNOR NEWS COMPANY, INC. and SHELDON A LONER, and NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK and VICINITY, Party to the Contract

DECISION and ORDER.—February 16, 1951

On October 19, 1950, Trial Examiner Sydney S. Asher issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and supporting brief.

[fol. 10] The Board [1] has reviewed the Trial Examiner's rulings made at the hearing and finds no prejudicial error was committed. The rulings are herey affirmed. [2] The

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[1] Pursuant to the provisions of Section 3 (b) of the Act, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

[2] While we agree that the Trial Examiner properly rejected the Respondent's offer to prove that Loner, the charging party, made the Board his tool in his attempt to obtain membership in the Union, we do not adopt his categorical conclusion that "the motives of the charging party, 'however evil or unlawful,' are immaterial." Although the underlying motives of the charging party cannot deprive the Board of its jurisdiction to proceed after the filing of the charge, his motives may be material on the question of the Board's discretion to accord the charging party the protection of the Act if it feels that its processes are being abused. *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9. However, even assuming Respondent were able to prove that Loner was motivated as contended, we do not consider that it would be in the public interest to fail to remedy the Respondent's unfair labor practices here found.

Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case,[3] and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the following additions and modifications.[4]

1. The Trial Examiner found that neither the January 2, 1946, contract nor the supplementary agreement dated August 22, 1946, between the Respondent and the Union required the Respondent to make retroactive wage payments to *any* of its employees, and he therefore rejected [fol. 11] the Respondent's contention that it made such payments under the compulsion of a legally binding agreement. He further found that even assuming that the 1946 contract required these retroactive payments to union members, the Respondent was nevertheless not precluded from making equal payments to nonunion employees. Following the issuance of the order transferring the case from the Trial Examiner to the Board, the parties by stipulation[5] agreed to incorporate in the record as additional evidence a copy of a second supplementary agreement entered into between the Respondent and the Union on October 9, 1947,

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[3] The Respondent's request for oral argument is hereby denied, as the exceptions and brief and the record, in our opinion, adequately present the issues and the positions of the parties.

[4] As we agree with the Trial Examiner's construction of Section 17 of the October 25, 1948, contract and as the record contains no other evidence that the contracting parties had agreed in writing to defer application of the contract's illegal union-security provision, we find it unnecessary to adopt the further reasoning of the Trial Examiner set forth in footnote 37 of the Intermediate Report.
93 NLRB No. 36.

[5] The stipulation, dated November 29, 1950, provides that the document attached thereto is a copy of the supplementary agreement entered into by and between the Respondent and the Union on October 9, 1947, amending the January 2, 1946, contract then in effect, and that the same be made a part of the record in this proceeding.

which further amended the January 2, 1946, contract by providing *inter alia:*

> In the event that the parties enter into a new written contract effective from the expiration of the existing contract which new contract shall expire no earlier than three months after the effective term of any new written contract which the Union may enter into with the Publishers' Association of New York City, then and in such event, the wage rates provided in such new contract between the parties hereto shall be applicable retroactively for the last three months of the present existing contract between the parties hereto in lieu and instead of the wage rates provided in the present existing contract between the parties hereto for the said three months period.

[fol. 12] While this new evidence indicates that the Respondent had contracted to make retroactive wage payments to the employees covered by the original contract, it does not affect the validity of the Trial Examiner's basic conclusion, with which we agree, that the contract affords no defense to the allegation that the Respondent unlawfully engaged in disparate treatment of employees on the basis of union membership or lack of it, as there is nothing in the supplemental agreement of October 9, 1947, which prohibits equal payments to nonunion employees. [6]

2. Unlike the Trial Examiner we are not persuaded that the Respondent's past conduct as revealed by the record in this case is indicative of a predilection to commit other unfair labor practices in the future. We shall therefore not adopt his recommended broad cease and desist order but shall order the Respondent to cease and desist only from engaging in the unfair labor practices found and any like or related conduct.

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the

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[6] *Reliable Newspaper Delivery, Inc.*, 88 NLRB No. 135.

Respondent Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other [fol. 13] labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any term or condition of employment of any of its employees because of their nonmembership in such organization, or by any like or related conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to join labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Entering into, renewing, or enforcing any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended. [fol. 14] (d) Recognizing Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of its employees for the pur-

poses of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Sheldon A. Loner and all other nonunion employees, who were similarly situated, for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the Intermediate Report in the section entitled "The remedy."

(b) Withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organization shall have been certified by the National Labor Relations Board.

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, [fol. 15] time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this order.

(d) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked Appendix A.[7] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicu-

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[7] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the word, "A Decree of the United States Court of Appeals Enforcing."

ous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., February 16, 1951.

Paul M. Herzog, Chairman, Abe Murdock, Member, Paul L. Styles, Member, National Labor Relations Board. (Seal.)

[fols. 16-18] APPENDIX A.

Notice to all Employees

Omitted. Printed side page 6 ante.

[fol. 19] INTERMEDIATE REPORT

Before the National Labor Relations Board, Division of Trial Examiners, Washington, D. C.

[Title omitted]

Messrs. Merton C. Bernstein and Jerome A. Reiner, for the General Counsel.

Bandler, Haas & Kass, by Messrs. Julius Kass and Richard L. Halpern, of New York, N. Y., for the Respondent.

Mr. Samuel Duker, of New York, N. Y., for the Union.

Statement of the Case.

Upon amended charges duly filed by Sheldon A. Loner, [fol. 20] an individual, the General Counsel of the National Labor Relations Board,[1] by the Regional Director of the Second Region (New York, New York), issued a

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[1] The General Counsel and his representative at the hearing are referred to as the General Counsel. The National Labor Relations Board is referred to as the Board.

complaint dated June 13, 1950, against Gaynor News Company, Inc., Mount Vernon, New York, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1), (2), and (3), and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Copies of the charge, the amended charge, the complaint, and the notice of hearing were duly served upon the Respondent and upon Newspaper & Mail Deliverers' Union of New York and Vicinity, herein called the Union.

In substance, the complaint alleged that: (1) on October 25, 1948, the Respondent instituted an increased wage rate and other benefits for its employees in certain described categories; (2) in October or November 1948, the Respondent paid each of its employees in the said categories who was a member of the Union retroactive wages from July to October 1948, and has failed and refused to pay similar retroactive wages to each of its employees in the said categories who was not a member of the Union, including Sheldon A. Loner; (3) in October or November 1948, the Respondent granted each of its employees in the said categories who was a member of the Union a vacation with pay or the equivalent pay, and has failed and refused to grant a similar vacation with pay or the equivalent pay to each of its employees in the said categories who was not a member of the Union, including Sheldon A. Loner; (4) on [fol. 21] October 25, 1948, the Respondent and the Union entered into a collective bargaining agreement covering the Respondent's employees in the said categories which required membership in the Union as a condition of continued employment; and (5) the said agreement is invalid and in violation of the Act.

The Respondent duly filed its answer which, in effect, admitted certain facts with respect to commerce, admitted that on or about October 25, 1948, it increased wages and other benefits for its employees in certain categories, admitted that in October or November 1948, it paid retroactive wages to each employee in the said categories who was a member of the Union and has failed to make similar payments to each of *each of* its employees in the said

categories who was not a member of the Union, including Loner, admitted that in October or November 1948, it granted retroactive vacation benefits to each of its employees in the said categories who was a member of the Union and has failed to grant similar vacation benefits to each of its employees in the said categories who was not a member of the Union, including Loner, admitted that it had executed a contract with the Union, but denied the invalidity of the contract, and denied the commission of any unfair labor practices. The Union likewise filed an answer in which it made substantially similar admissions and denials, except with respect to certain facts concerning commerce. With respect to certain commerce facts, the Union denied knowledge or information sufficient to form a belief. As an affirmative defense, the Union alleged, in effect, that the Union had filed with the Board's Regional Director for the Second Region a petition for authority to bargain [fol. 22] with respect to union security, and that the said Regional Director arbitrarily, unreasonably, and in derogation of law, had refused to entertain the said petition.

Pursuant to notice, a hearing was held on July 17, 18, and 19, 1950, at New York, New York, before Sydney S. Asher, Jr., the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

At the outset of the hearing, the Respondent moved to bar one of the attorneys for the General Counsel from participation, on the ground that he was serving without compensation and was therefore not an employee of the Board. The motion was denied.[2] The Union moved to in-

[2] The records of the Board, of which I have taken judicial notice, indicated that the attorney in question was clothed with full authority to represent the General Counsel in this case. The fact that he was serving without compensation is immaterial. Section 4 (a) of the Act provides: "The Board may * * * utilize such voluntary and uncompensated services, as may from time to time be needed."

tervene. The motion was granted, but the right of the Union to intervene was restricted to the question of the legality of the contract between the Union and the Respondent. The Respondent's motion to bar the Union from further participation in the hearing was denied.[3] The Union moved to amend its answer with respect to certain formal statements therein. Without objection, the motion was granted.

[fol. 23] The General Counsel moved to amend the complaint by adding allegations that the contract of October 25, 1948, in addition to requiring membership in the Union as a condition of continued employment, "otherwise provided for the preferential treatment of Union members," and that the said contract is still in full force and effect. The motion was granted. The Respondent moved to dismiss so much of the complaint as alleged the execution of an illegal contract on October 25, 1948, on the ground that the charge referring to the contract was filed and served more than 6 months after the alleged date of the execution of the contract. The motion was denied. This ruling will be discussed hereafter. The Respondent further moved to dismiss so much of the complaint as referred to the contract of October 25, 1948, on the ground that there was a fatal variance between the pleadings and the proof. Ruling on this motion was reserved. It is hereby denied, for reasons discussed below.

The Union moved to dismiss the complaint on the ground that the contract showed on its face that it was not illegal. Ruling on this motion was reserved. It is hereby denied, for reasons discussed below.

The General Counsel moved to strike that part of the Union's answer which alleged as an affirmative defense that the Union had filed a petition for authority to bargain with respect to union security and that the Board's Regional Director had arbitrarily refused to entertain the petition.

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[3] During the course of the hearing, the Respondent made four other similar motions based, in part, upon the absence of the Union's attorney from some of the sessions of the hearing. All such motions were denied.

Ruling was reserved on this motion. It is hereby denied.[4] [fol. 24] During the course of the hearing, the Respondent orally moved that the Trial Examiner disqualify himself because of exhibited bias and prejudice, on the ground that the Trial Examiner had consistently made rulings which had no basis in law. The motion was denied.[5] The Respondent also moved to quash a subpoena served upon it, requiring it to produce certain records. The motion was denied.[6]

At the close of the General Counsel's case-in-chief, the Respondent made three motions to dismiss the complaint. Ruling on these motions was reserved. They are disposed of herein.

At the close of the hearing, the General Counsel moved to amend the complaint as to all formal matters. In the absence of objection, the motion was granted. The Respondent made three additional motions to dismiss the complaint. Ruling on these motions was reserved. They are disposed of herein. All parties were afforded an opportunity to present their contentions orally upon the record. The General Counsel and the Respondent did so. All parties were granted time after the close of the hearing to file briefs and/or proposed findings of fact and conclusions

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[4] As the Union introduced no evidence to support its affirmative defense, the denial of the General Counsel's motion to strike the affirmative defense cannot substantially affect the rights of any of the parties.

[5] *West Texas Utility Company, Inc.*, 85 NLRB 1396 (footnote 2 therein) enforced, F. 2d (C.A.D.C.), July 10, 1950, 26 LRRM 2359. The Respondent did not support its motion by any affidavits "setting forth in detail the matters alleged to constitute grounds for disqualification," as required by Rules and Regulations of the Board—Series 5, as amended, Section 203.37.

[6] The Respondent's motion to quash the subpoena was made orally, and more than 5 days after the service of the subpoena. Rules and Regulations of the Board—Series 5, as amended, Section 203.31 (b), provides that such motions shall be made *in writing within 5 days after service of the subpoena.*

of law. The Respondent has submitted a brief which has been considered.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

[fol. 25] Findings of Fact

I. The Business of the Respondent [7]

The Respondent is a New York corporation, with its principal office and place of business in Mount Vernon, New York. It is engaged in the business of the purchase, sale, and wholesale distribution and delivery of newspapers, magazines, and other periodicals to retail stands. During the year ending January 1949, the Respondent, in the course and conduct of its business operations, caused to be purchased, transferred, and delivered to its place of business in Mount Vernon, New York, newspapers, magazines, and other periodicals valued at in excess of $500,000, of which approximately 10 percent was transported to its place of business in New York from points outside the State of New York. Among publishers from whom the Respondent purchased newspapers, magazines, and other periodicals were the Curtis Publishing Company, in Philadelphia, Pennsylvania, and the Fawcett Publishing Company, in Greenwich, Connecticut. Among the newspapers purchased by the Respondent were the New York Times, the New York Herald-Tribune, the New York Daily News, and the New York Mirror, all of which utilize the wire services of the United Press and the Associated Press.

The periodicals purchased by the Respondent are delivered by the publishers to the Respondent's plant. They are then bundled and delivered to dealers in trucks driven by the Respondent's employees. Unsold copies are returned to the Respondent's plant. During the year ending January [fol. 26] 1949, the Respondent, in the course and conduct

[7] The facts contained in this section are derived from the Respondent's answer, stipulations entered into between the General Counsel and the Respondent, and the uncontradicted testimony of James B. Gaynor, president of the Respondent.

of its business operations, sold and delivered newspapers, magazines, and other periodicals valued at in excess of $1,000,000, of which approximately 25 percent was transported from its place of business in New York to points outside the State of New York.

The Respondent is a member of the Suburban Wholesalers Association, which has members in the States of New York and New Jersey.

The Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act.[7a]

II. The Organization Involved

Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. The issue of Section 10 (b)

The original charge, which was served upon the Respondent on February 3, 1949, alleges in effect that, since July 20, 1947, and at all times thereafter, the Respondent violated Section 8 (a) (1) and (3) of the Act by paying Sheldon A. Loner lower wages than it paid to members of the Union and has refused to pay Loner retroactive pay for the period from July 17 to October 31, 1948, and vacation benefits which it paid to members of the Union, because he was not a member of the Union. The amended charge, served on the Re- [fol. 27] spondent on June 13, 1950, alleges in effect that the Respondent since August 1, 1948, and at all times thereafter, violated Section 8 (a) (1), (2), and (3) of the Act by failing and refusing to pay Loner retroactive pay for the period from July 17 to October 31, 1948, and vacation pay which it paid to members of the Union, because he was not a member of the Union, and by executing, on October 25, 1948, an illegal contract requiring membership in the Union. The complaint, as described above, alleges in effect that the Respondent failed and refused to make retroactive wage

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[7a] Stanislaus Implement and Hardware Company, Limited, 91 NLRB No. 116.

payments and grant retroactive vacation benefits not only to Loner, but to all other nonunion employees similarly situated.

The Respondent takes the position that the complaint should be limited to the alleged violation of Section 8 (a) (1) and (3) involved in its failure to pay Loner retroactive pay for the period from July 17 to October 31, 1948, and the failure to pay him retroactive vacation pay which it paid to members of the Union. It would exclude from consideration all allegations that similar treatment was accorded to nonmembers of the Union other than Loner, and any consideration of the legality or illegality of the contract of October 25, 1948, on the ground that these allegations were added to the original charge more than 6 months after the alleged acts had taken place. This position is predicated upon the proviso to Section 10 (b) of the amended Act, the pertinent part of which reads as follows:

> * * * No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom said charge is made. * * *

[fol. 28] In *Cathey Lumber Company,*[8] a charge had been filed and served prior to the enactment of the proviso to Section 10 (b), quoted above. After the proviso took effect, the complaint was issued. It contained allegations of additional unfair labor practices not set forth in the charge, which had occurred prior to the effective date of the proviso and more than 6 months prior to the issuance of the complaint. The respondent in that case and the General Counsel, pointing to the provisions of Section 10 (b), there contended that the Board could not include in the complaint any allegations of unfair labor practices which were not included in the original charge and which occurred more than 6 months prior to the issuance of the complaint. In rejecting this view, the Board stated:

> As there is no requirement that the charge set forth each unfair labor practice allegation to be litigated,

[8] 86 NLRB 157.

the practice of enlarging upon the charge to include in the complaint allegations of unfair labor practices uncovered during the investigation likewise continues unchanged under the Amended Act—but with this important exception made necessary by the purpose of the limitation period imposed by the proviso: that the complaint shall not include allegations of any unfair labor practices occurring more than 6 months prior to the filing and service of the charge initiating the case. it follows that we must reject the construction of the proviso to Section 10 (b) advocated by the Respondent and the General Counsel to the extent that it would also proscribe inclusion in the complaint of allegations of unfair labor practices not specifically mentioned in a charge, although the charge was filed with the Board [fol. 29] and served upon the party charged within 6 months after the commission of the particular alleged unfair labor practices.

Upon the basis of the foregoing, we conclude that *the proviso to Section 10 (b) merely extinguished liability for those unfair labor practices which were committed more than 6 months prior to the filing and service of the charge initiating the case, and that a complaint may lawfully enlarge upon a charge if such additional unfair labor practices were committed no longer than 6 months prior to the filing of such charge.* (Emphasis added.)

The Respondent relies upon *Joanna Cotton Mills Company v. N.L.R.B.*[9] and *Superior Engraving Company v. N.L.R.B.*[10] as authorities repudiating the *Cathey* doctrine. With great respect for the courts which decided those cases, I am constrained to adopt the principle enunciated by the Board in the *Cathey* case until the Supreme Court of the United States has had an opportunity to pass upon the question.[11]

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[9] 176 F. 2d 749 (C. A. 4).

[10] F. 2d (C. A. 7), decided June 27, 1950, 26 LRRM 2351.

[11] Compare *Bethlehem Steel Company, Shipbuilding Division, et al.*, 89 NLRB No. 33; and *J. H. Rutter-Rex Manufacturing Company, Inc.*, 90 NLRB No. 15.

The doctrine set forth in the *Cathey* case, which has been consistently followed by the Board,[12] is dispositive of the Respondent's contentions herein. I therefore find that the charges herein were timely filed and served with respect to [fol. 30] any unfair labor practices which occurred within the 6 months prior to February 3, 1949, whether or not said unfair labor practices were specifically mentioned in the original charge. Accordingly, the Respondent's motion to strike certain allegations of the complaint has been denied.

B. Chronology of events

The essential facts are not disputed. The Respondent and the Union have had collective bargaining agreements with respect to the employees of the Respondent's delivery department since 1943. On January 2, 1946, they executed a contract in which it was stated that the Union was contracting "for and in behalf of the Union and for and in behalf of the members thereof now employed and hereafter to be employed by the employer." [13] This agreement was made effective from October 1, 1945, to October 16, 1947.

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[12] See, for example, *J. H. Rutter-Rex Manufacturing Company, Inc.*, 86 NLRB 470. The Intermediate Report in *Childs Company*, Cases Nos. 2-CA-420 and 2-CB-130, cited by the Respondent, contains nothing inconsistent with the *Cathey* principle. Moreover, this Intermediate Report is presently pending before the Board for decision.

[13] The contract described the categories covered as "chauffeurs, distributors, route men, tiers, floor men, wrapper writers, relay men, and Canada men." The General Counsel and the Respondent stated at the hearing that all the categories listed in the contract were employed in the Respondent's delivery department. For convenience, these employees will be collectively referred to herein as the delivery department employees.

James B. Gaynor, president of the Respondent, testified without contradiction that chauffeurs and route men are the same as drivers, that he did not know what distributors are, that tiers, wrapper writers, and loaders are the same as floormen, and that the Respondent employs no Canada men nor relay men.

It contained a closed-shop clause, provided for specified wages, and for paid vacations based on the number of days worked during the previous year.

Despite the closed-shop provisions of this contract, the Respondent employed in its delivery department employees known to be nonunion.

On August 22, 1946, the parties executed an agreement extending the term of the previous contract to October 18, [fol. 31] 1948. This extension agreement increased wages and contained other amendments, not here material.

On August 16, 1948, while the above-described contract, as extended, was in force, the Union filed with the Board's Regional Director for the Second Region a petition covering the Respondent's delivery department employees,[14] seeking authority to bargain with respect to union security.[15] At the Union's request, the Regional Director approved the withdrawal of this petition on September 13, 1948.[16]

Thereafter, on October 25, 1948, the Respondent and the Union entered into a new collective bargaining contract in which the Respondent recognized the Union as the exclusive bargaining representative of the Respondent's employees in its delivery department.[17] This contract is still in effect.[18] It increased wages beyond the previous rates,

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[14] The unit described in the petition included all the Respondent's drivers, route men, and loader, but excluded foremen, clerical employees, guards, and professional employees. Hence, it was substantially the same as the unit covered in the contract. See footnote 13, *supra.*

[15] *Gaynor News Co.,* Case No. 2-UA-4273.

[16] At the request of the General Counsel, I have taken judicial notice of the Board's records in Case No. 2-UA-4273. *J. S. Abercrombie Company,* 83 NLRB 524, petition for review denied, 180 F. 2d 578 (C. A. 5).

[17] The unit described in the contract of October 25, 1948, is identical with that contained in the 1946 contract.

[18] The contract provided that it should remain in force for 90 days after "the expiration date of the contract between the Union and the Publishers Association of New York." The parties stipulated that the Publishers Association's contract is due to expire on October 25, 1950.

and provided for more liberal vacation benefits. It further contained certain clauses which the General Counsel maintains violate the Act. These clauses will be discussed below.

In November 1948, the Respondent made a retroactive wage payment to each union member employed in the [fol. 32] categories here involved, covering the period from July 17 to October 25, 1948.[19] No similar payments were made to nonunion employees in these categories.

Sheldon A. Loner, a witness for the Respondent, testified, in effect, that he had been employed in the Respondent's delivery department from June 1947 to December 3, 1948. In November 1948, Loner learned from other employees who were members of the Union that retroactive wage payments were being made to union members. He then asked Murray Levine, the Respondent's night foreman, "Do I get retroactive pay?" Levine replied that Loner was not entitled to retroactive pay because he was not a member of the Union. Despite the fact that Loner had worked during the period between July 17 and October 25, 1948, he received no retroactive wage payment.

As noted above, the 1946 contract provided for vacations with pay, based upon the number of days worked in the preceding calendar year. In 1948, paid vacations were granted to employees of the delivery department who were members of the Union, based on the number of days worked in 1947, and calculated according to a schedule contained in the 1946 contract. As has also been seen, the 1948 contract provided for more liberal vacation benefits. Starting in January 1949, the Respondent made payments to employees in its delivery department who were members of the Union, based on the number of days worked in 1947, to compensate retroactively for the dif- [fol. 33] ference between the vacation schedules of the 1946

[19] This was computed as follows: The difference between the old daily rate and the new daily rate was multiplied by the number of days worked by the employee in question between July 17 and October 25, 1948. A similar retroactive increase was computed for overtime work on the basis of time and a half.

and 1948 contracts. No similar payments were made to delivery department employees who were not members of the Union. Loner received no vacation in 1948, and was not given any payment in lieu of vacation, although he had worked a sufficient number of days in 1947 to have qualified had he been a union member. [20]

In 1949, the Respondent granted vacations equally to its union and nonunion employees.

C. Legality of the Retroactive Wage and Vacation Payments

In essence, the facts show that the Respondent, as charged in the complaint, made retroactive wage payments and retroactive payments in lieu of vacation to its delivery department employees who were members of the Union, but failed and refused to make similar payments to nonunion delivery department employees who were otherwise eligible. The sole factor in determining whether or not a particular employee received these payments was his membership or nonmembership in the Union. Leon Asche, manager of the Respondent's bookkeeping department, testified as follows:

Trial Examiner Asher: Mr. Asche, you have testified that certain payments were made to union men only. How did you know which men were union and which men were not in order to determine whether to make payments to them or not?

[fol. 34] Witness: I was told through Mr. Gaynor.

Trial Examiner Asher: Did Mr. Gaynor supply you with a list?

The Witness: With a record, not with a list. We were supplied with employees' record cards which are marked union if they are union.

Trial Examiner Asher: Do you have such a record card for each employee on the payroll?

The Witness That's right.

Trial Examiner Asher: And opposite each employee's

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[20] The facts contained in this paragraph are based primarily on the admissions in the Respondent's and the Union's answers, and the testimony of Leon Asche, manager of the Respondent's bookkeeping department.

name on these cards is shown whether or not he is a union member?

The Witness: That is the only way I know of, who are members and who are not.

Trial Examiner Asher: You have seen those cards?

The Witness: Yes.

Trial Examiner Asher: And you used those cards as a guide?

The Witness: Right.

Under strikingly similar facts, the Board has held that the granting of retroactive wage payments to employees who were union members, while failing and refusing to grant such payments to employees who were not union members, constitutes a violation of Section 8 (a) (1) and (3) of the Act. [21]

[fol. 35] The Respondent contends that the retroactive wage payments and vacation benefits were paid under the compulsion of a legally binding contract, and therefore cannot be held violative of the Act. It argues: "The employer in this case has been guilty only of the time-honored business practice of not spending money which he is not obliged to spend." In support of this contention, James B. Gaynor, the Respondent's president, testified without contradiction that he ordered retroactive wage payments and vacation benefits withheld from nonunion employees because he believed that the 1946 contract and its supplement required such payments to be made to union members only. The short answer to this argument is that neither the 1946 contract nor its supplement of August 22, 1946, required these retroactive payments to be made to *any* employees. [22]

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[21] *Reliable Newspaper Delivery, Inc.*, 88 NLRB No. 135.

[22] The Respondent's brief states: "In October, 1947, a rider was attached to the 1946 contract to the effect that the wage rate of the new contract to be drawn in October, 1948, would be retroactive to a certain date in 1948, that date being the date the Union and the Publishers' Association signed their contract. In conformance with the terms of the January 2, 1946 contract, * * * this rider applied only to Union members like all other provisions of that 1946 contract." The record, however, does not show the execution of any October 1947 rider.

Indeed, the Respondent's counsel, referring to the retroactive vacation benefits, frankly admitted that these payments were granted voluntarily, and not as the result of any contractual obligation. The statement of the Respondent's counsel on this point was as follows:

> "Because of the fact that it had been established as general practice in other branches of the industry, and *despite the fact that under the contract we were not obligated to give our employees a third week of retroactive vacation*, in the interests of good labor relations and to maintain peace with the Union, and not [fol. 36] to have a different standard apply throughout the industry, *we voluntarily granted those of our employees who were with us a third week's vacation.*" (Emphasis supplied.)

It is therefore abundantly clear that the Respondent was not "acting in good faith in accordance with the terms of its agreement," as alleged in the Respondent's brief, at least insofar as the vacation benefits were concerned. But even assuming, for the purpose of argument, that the 1946 contract required these retroactive payments to union members, and assuming the validity of that contract,[23] the Respondent can derive no comfort therefrom, as it is clear that nothing in the contract prohibited equal payments to nonunion employees.[24] Thus, even-handed treatment of the nonunion employees would not have amounted to a contract violation. And the gist of the discrimination

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[23] The Respondent takes the position that the 1946 contract, executed before the enactment of the Labor Management Relations Act of 1947, is valid. The General Counsel, arguing orally before the Trial Examiner at the hearing, pointed out that the January 1946 agreement and its supplement were "members only" contracts, and maintained that they therefore provided for an inappropriate unit. In view of my disposition of the Respondent's defense based on the 1946 contract, I do not express any opinion as to the contract's validity.

[24] *Reliable Newspaper Delivery, Inc., supra,* (footnote 1 therein).

with which the Respondent is charged is not for the granting of retroactive payments to the union employees, but rather the disparate treatment accorded the nonunion men.

The Respondent further contends that the closed-shop provisions of the 1946 contract were valid under the proviso to Section 8 (3) of the Wagner Act,[25] that the nonunion [fol. 37] employees could therefore have been legally discharged during the life of that contract, and that their wages could accordingly have differed from those of the union employees. This contention lacks merit. The proviso to Section 8 (3) of the Wagner Act, like its counterpart in Section 8 (a) (3) of the amended Act, permitted the conditioning of *employment*, under certain circumstances, upon membership in a particular labor organization; it did *not* permit *disparate wage treatment* of employees on the basis of union affiliation.[26] The Respondent's argument that "There is no difference between discrimination by means of an illegal discharge and discrimination by means of disparate payments of wage and vacation benefits" is therefore rejected.

The Respondent further maintains that no law requires it to pay equal pay for equal work. This overlooks Section 8 (a) (1) of the Act, which prohibits interference with the employees' selection of bargaining agent. Section 8 (a) (2), which prohibits illegal assistance to a labor organization, and Section 8 (a) (3), which prohibits discrimination to encourage or discourage membership in a labor organization. If the unequal pay interfered with the employees' freedom of choice of bargaining representative, lent illegal support to the Union, or encouraged membership in the Union, it was proscribed by the Act.

The Respondent offered to prove that Loner, the charging party herein, made the Board his tool in his attempt to obtain membership in the Union. In addition, the Re-

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[25] This proviso read: "Nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein."

[26] *Reliable Newspaper Delivery, Inc., supra,* (footnote 1 therein).

spondent points to the fact that the Union was not joined as a party respondent. But the motives of the charging [fol. 38] party, "however evil or unlawful," are immaterial.[27] Nor may I properly concern myself with speculations as to why the Union was not joined as a respondent. The sole question before me is the truth of the accusations of unfair labor practices contained in the complaint.

As tending to establish that the granting of retroactive wage increases and vacation benefits to union employees alone did not encourage membership in the Union, the Respondent offered to show that the nonunion employees were "trying every devise known" to become members of the Union. It contended that, as their selection of bargaining agent had already been made, "encouragement of and interference therewith was no longer possible." In support of this contention, the Respondent sought to produce evidence that Loner had obtained his job with the Respondent through union intercession, and that before the retroactive payments were made, he had applied for membership in the Union and that his application was still pending. This proffered testimony was excluded, in accordance with the well-settled principle that the actual effect of the Respondent's conduct upon its employees' state of mind is immaterial.[28] Accordingly, testimony inquiring into Loner's state of mind, or that of any other employee, is incompetent.

The Respondent also contends that the General Counsel is required to produce proof of both the purpose and effect of the Respondent's conduct, and that he has failed to adduce any proof of illegal purpose. An identical con- [fol. 39] tention was considered and rejected in the *Reliable* case,[29] For reasons set forth in that case, I find no merit in this contention.

Finally, the Respondent vigorously contends that the record is barren of any evidence that the discriminatory

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[27] *N.L.R.B. v. Fulton Bag & Cotton Mills*, 180 F. 2d 68 (C.A. 10).

[28] *The Red Rock Company, et al.*, 84 NLRB 521, 525; and *Forest Oil Corporation*, 85, NLRB 85, 86.

[29] *Reliable Newspaper Delivery, Inc., supra* (footnote 9 of the Intermediate Report).

treatment of nonunion employees encouraged them to join the Union. However, it was in incumbent upon the General Counsel to prove that an- nonunion employees were, in fact, encouraged. The test of the Respondent's violation of the Act turns on whether or not it has engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.[30] It is obvious that the discrimination with respect to retroactive wages and vacation benefits had the natural and probable effect not only of encouraging nonunion employees to join the Union, but also of encouraging union employees to retain their union membership.[31] I so find.

I find that, by granting retroactive wage payments in or about November 1948, and by paying retroactive vacation benefits beginning in or about January 1949, to certain of its employees who were members of the Union, while failing and refusing to make such payments to its nonunion employees who were similarly situated, because they were [fol. 40] not members of the Union, the Respondent has discriminated in regard to the terms and conditions of employment of the said nonunion employees, thereby encouraging membership in the Union, in violation of Section 8 (a) (3) of the Act, and thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act. I further find that, by the said conduct, the Respondent has contributed illegal assistance and support to the Union, in violation of Section 8 (a) (2) of the Act. Accordingly, the Respondent's various motions to dismiss the complaint are hereby denied.

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[30] *N.L.R.B. v. Illinois Tool Works Company*, 153 F. 2d 811, 814 (C. A. 7); and *N.L.R.B. v. Ford Brothers*, 170 F. 2d 735 (C.A. 6).

[31] The General Counsel also urges that the disparate treatment discouraged membership in any potential or existing rival labor organization. However, the complaint alleges only the *encouragement* of membership in the Union, and is silent as to discouragement. Accordingly, I deem it unnecessary to decide whether or not the Respondent's acts constituted discouragement of membership in any other labor organization.

D. Legality of the contract of October 25, 1948

The General Counsel maintains that two clauses in the contract of October 25, 1948, between the Respondent and the Union, are illegal. One of the clauses under attack by the General Counsel reads as follows:

> 2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

This contract, having been executed after the effective date of the Labor Management Relations Act of 1947, is subject to the restrictions imposed by amendments contained therein. In order to determine the legality or illegality of the above-quoted clause, it is therefore necessary to examine the statutory requirements of the Act, as amended, [fol. 41] with respect to contracts providing for union security. Section 9 (e) of the Act, as amended, provides for Board-conducted elections and certifications of authority to bargain with respect to union security. Section 8 (a) (3) of the Act, as amended, in effect prohibits discrimination with respect to the hire or tenure of employment to encourage or discourage membership in any labor organization, and contains the following proviso:

> * * * nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * * if, following the most recent election held as provided in section 9 (e) *the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement* * * * (Emphasis supplied.)

Thus, an election under Section 9 (e) and a resulting Board certificate are ordinary *prerequisites* to the execution of a valid union-security provision. Pointing out that the record does not show that the Union had received any such certificate from the Board prior to the execution of the contract, the General Counsel maintains that section 2-b of the contract does not fall within the proviso to Section 8 (a) (3) of the Act, as amended. Unquestionably, as the General Counsel contends, the record fails to show that the Board certified the Union's authority to bargain with respect to union security, prior to the execution of the [fol. 42] contract.[32] Section 2-b of the contract therefore clearly violated the statutory requirements. The mere existence of such a provision acts as a restraint upon those desiring to refrain from union activities within the meaning of Section 7 of the Act.[33] Moreover, by assenting to an unlawful union-security clause, the Respondent lent its support to the Union in recruiting and maintaining its membership. By entering into such a contract, and by

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[32] It will be recalled that the Union's answer alleged that the Union had filed a petition for authority to bargain with respect to union security and that the Regional Director had arbitrarily refused to process this petition. The record fails to substantiate this allegation. Indeed, the only such petition filed *before* the execution of the contract was withdrawn at the Union's request. *After* the execution of the contract on January 11, 1949, the Union filed another petition with respect to union security (Case No. 2-UA-4890). This petition, which covered employees of members of the Suburban Wholesalers Association, Inc., including the Respondent, is still pending. On December 19, 1949, the Union filed a third similar petition with respect to the Respondent's delivery department employees (Case No. 2-UA-5448). At the Respondent's request, this petition was withdrawn on January 4, 1950. Thus, no election for union security has been held, and no Board certificate issued.

[33] *C. Hager & Sons Hinge Manufacturing Company,* 80 NLRB 163.

keeping it in full force and effect, the Respondent has therefore violated Section 8 (a) (1) and (2) of the Act.[34]

The Respondent and the Union maintain, however, that section 17 of the contract defers the application of the union-shop provision until after the Union has been authorized by the Board to bargain with respect to union security, and therefore saves the contract from illegality. [fol. 43] I do not agreed. Section 17 of the contract, relied upon by the Union and the Respondent, reads in pertinent part as follows:

> To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In the event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

It is true that the Board has held that a contract which contains a clause that its union-security provisions should not become effective until after it has been authorized by an election is clearly lawful.[35] On the other hand, where the effect of a saving clause, attached to an unauthorized union-security provision, is not to defer the application

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[34] *Julius Resnick, Inc.*, 86 NLRB 38; and *Salant & Salant, Incorporated*, 87 NLRB No. 36.

The Respondent's attorney described the relationship between the Respondent and the Union as follows: "We fight like cats and dogs. We negotiate at arm's length. We are hostile to one another." Assuming, without deciding, that the record indicated that hostility existed between the Respondent and the Union, such fact is not inconsistent with a finding that the Respondent, by entering into a contract containing illegal union-security provisions, contributed unlawful support and assistance to the Union.

[35] *Schaefer Body, Inc.*, 85 NLRB 195; and *Wyckoff Steel Company*, 86 NLRB 1318.

of that provision, but merely to postpone the issue of its legality for future determination by some proper tribunal, the contract in which the clause appears is illegal.[36] Section 17 of the instant contract falls within the latter rule. In the absence of a specific clause expressly deferring application of the union-shop provision, I believe that this clause can only be construed to mean that unless and until a tribunal authorized to interpret and administer the law [fol. 44] determines that a particular discharge for nonmembership in the Union is unlawful, the union-security provisions of the contract are fully effective.[37] Accordingly, section 17 of the contract does not save the union-security clause from illegality.[38]

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[36] *Lykens Hosiery Mills, Inc.*, 82 NLRB 981; *Unique Art Manufacturing Co.*, 83 NLRB 1250; and *Aluminum Ore Company*, 85 NLRB 121 (footnote 7 therein).

[37] *Reading Hardware Corporation*, 85 NLRB 610; and *Evans Milling Company*, 85 NLRB 391. The Respondent's brief states: "The parties further agreed that in conformance with the provisions of the Taft-Hartley Act, a union shop election would be held as soon as was practicable." The record does not support this statement. However, even if such an arrangement had been made, it would not aid the Respondent. In order to eradicate the restraint imposed upon the employees by the unauthorized union-shop provision, the deferring of its effectiveness until a Board certification has been secured must be in writing, signed by both contracting parties, and called to the attention of the employees. *Evans Milling Company, supra; Flint Lumber Company*, 85 NLRB 943; *Roosevelt Oil and Refining Corporation*, 85 NLRB 965; and *Empire Zinc Division, The New Jersey Zinc Company*, 86 NLRB 685.

[38] The Respondent intimates that it was compelled to enter into this contract by virtue of the Union's superior economic power. However, it has long been established law that economic necessity is no defense for the commission of unfair labor practices. *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 470, (C. A. 9); *N. L. R. B. v. Gluek Brewing Company, et al*, 144 F. 2d 847, 853, (C. A. 8), and cases cited therein; and *H. M. Newman*, 85 NLRB 725 (footnote 13 of the Intermediate Report).

The second clause under attack by the General Counsel concerns the powers of an adjustment board established by the parties for the settlement of grievances. This clause, section 18-k, reads as follows:

> 18-k. A majority of the Adjustment Board shall have the power to make all appropriate findings, decisions and awards in any and all matters submitted to it pursuant to the provisions thereof, and in any such matter to take or to direct the taking of any action which it may deem necessary or proper to make effective the provisions and intent hereof to safeguard the rights of the several parties hereto *which shall in-*
> [fol. 45] *clude the power to order reinstatement of any member of the Union* found to have been improperly discharged or discriminated against with or without back pay * * *. (Emphasis supplied.)

The General Counsel contends that the above-quoted section of the contract grants a preference to members of the Union. I cannot agree. As I read section 18-k, it cloaks the adjustment board with authority "to take or direct the taking of any action which it may deem necessary or proper to make effective the provisions and intent thereof * * * which shall *include* the power to order reinstatement of any member of the Union found to have been improperly discharged or discriminated against." Thus, the first part of the section confers broad powers upon the adjustment board. The latter part, which refers specifically to union members, is only inclusive. Hence there is nothing in section 18-k which requires unequal treatment of nonunion members. Accordingly, I find no merit in the contention of the General Counsel that section 18-k of the contract contains an illegal preference in favor of union members.

I find that, by entering into an agreement with the Union on October 25, 1948, which contained illegal union-security provisions in section 2-b thereof, and by continuing the said contract in full force and effect, the Respondent has imposed a restraint upon those of its employees who desired to refrain from union activities within the meaning of Section 7 of the Act, as amended, and has thereby violated Section 8 (a) (1) of the Act. I further find that, by the said acts, the Respondent has lent its support to the

Union in recruiting and maintaining its membership and has coerced its employees to become and remain members [fol. 46] of the Union, thereby violating Section 8 (a) (2) of the Act.[39] Accordingly, I hereby deny the motion of the Union and the motions of the Respondent that the complaint be dismissed.[40]

E. Alleged additional interference, restraint, and coercion

It will be recalled that in November 1948, Murray Levine, the Respondent's night foreman, told Loner that Loner did not receive retroactive pay because he was not a member of the Union. The General Counsel suggested that this conduct on the part of one of the Respondent's supervisors might possibly have constituted an independent instance of interference, restraint, and coercion of the rights of employees guaranteed by Section 7 of the Act. However, the complaint does not mention this statement by Levine nor does it allege any separate instances of coercion other than those discussed above. Accordingly, I find it unnecessary to decide whether or not Levine's statement constituted an additional violation of Section 8(a) (1) of the Act.

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[39] While the complaint also alleged the execution and continuation of the contract as a violation of Section 8 (a) (3) of the Act, I find it unnecessary to pass upon this issue. Whether predicated upon a violation of Section 8 (a) (1), or of Section 8 (a) (3), or both, the remedy hereinafter recommended is necessary in order to effectuate the policies of the Act. See footnote 2 in *Smith Victory Corporation*, 90 NLRB No. 283; *Columbia Pictures Corporation, et al.*, 82 NLRB 568, 576.

[40] The Respondent also moved to dismiss the complaint with respect to the contract on the ground that there was a fatal variance between the allegation of the complaint and the proof. This motion was apparently based on the theory that section 17 of the contract showed on its face, that the contract was not illegal. In view of my findings, above, this motion is without merit and is hereby denied.

[fol. 47] IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the purposes and policies of the Act.

It has been found that the Respondent violated Section 8 (a) (1), (2), and (3) of the Act by paying retroactive wages and vacation benefits to employees of its delivery department who were members of the Union, while failing and refusing to make similar retroactive payments to employees of its delivery department who were not members of the Union. It will therefore be recommended that the Respondent cease and desist from encouraging membership in the Union or any other labor organization of its employees by discriminating with respect to any term or condition of their employment. It will further be recommended that the Respondent make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated,[41] for any loss of pay they may have suffered by rea-[fol. 48] son of the Respondent's failure and refusal to pay them retroactive wages for the period from about July 17 to about October 25, 1948, in the same manner as paid by the Respondent to its union employees, and also for any loss of pay they may have suffered by reason of the Respondent's failure and refusal to pay them retroactive vacation benefits for the calendar year 1947, in the same manner as paid by the Respondent to its union employees.

It has further been found that the Respondent violated

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[41] *Reliable Newspaper Delivery, Inc., supra; and Somerset Classics, Inc., et al.*, 90 NLRB No. 216.

Section 8 (a) (1) and (2) of the Act by executing and continuing in full force and effect the illegal union-security clause in its contract with the Union of October 25, 1948. The effect of such violation was to coerce its employees into becoming and remaining members of the Union, a vice which Section 8 (a) (3) and Section 9 (e) were intended to avoid. Accordingly I shall recommend that the Respondent cease and desist from giving effect to the illegal union-security clause.[42] I am also persuaded that the effect of the coercive conduct would not be eradicated were the Union to be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract and the discriminatory payments mentioned above. Therefore, in order to effectuate the purposes and policies of the Act, I shall recommend that the Respondent withdraw recognition from the Union and cease giving effect to its contract of October 25, 1948, with that organization, or to [fol. 49] any modification, extension, supplement, or renewal thereof, unless and until the Union has been certified by the Board. Nothing contained herein shall, however, be deemed to require the Respondent to vary or abandon those wage, hour, seniority, or other substantive features of its relations with its employees, established in the performance of the said contract, or to prejudice the assertion by the employees of any rights they may have under the said agreement.

In order to insure expeditious compliance with the recommended back-pay order, I shall recommend that the Respondent, upon reasonable request, make any pertinent records available to the Board and its agents.[43]

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[42] The Respondent argues that "an order requiring Respondent to cease and desist from giving effect to Section 2-b of the contract would create industrial disorder on a scale previously unknown in the industry." In the last analysis, the Respondent's contention is that it will be subjected to great hardship. Such an argument should be addressed to the Congress rather than to the Board or the Trial Examiner. Compare *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465, 470 (C. A. 9).

[43] *F. W. Woolworth Company*, 90 NLRB No. 41.

In my opinion, the execution and continuation in full force and effect of the illegal union-security clause contained in the contract of October 25, 1948, was a flagrant attempt by the Respondent to avoid its statutory obligations. Such contract clauses clearly constitute violations of the letter and the spirit of the Act, as amended. I therefore find that the unfair labor practices found are persuasively related to other unfair labor practices proscribed, and that danger of their commission in the future is to be anticipated from the course of the Respondent's conduct in the past.[44] The preventative purposes of the Act will be thwarted unless the order is coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby to minimize industrial strife which burdens and obstructs commerce, and thus effectuates [fol. 50] the policies of the Act, I will recommend that the Respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Newspaper and Mail Deliverers' Union of New York and Vicinity is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the terms and conditions of employment of Sheldon A. Loner, and of other nonunion employees similarly situated, thereby encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By the said acts, thereby contributing illegal assistance and support to Newspaper and Mail Deliverers' Union of New York and Vicinity, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (2) of the Act.

4. By executing and continuing in full force and effect

[44] *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426.

its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, thereby contributing assistance and support to the said labor organization through the illegal provisions of the said contract, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

[fol. 51] 5. By the said acts, the Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any term or condition of employment of any of its employees;

(b) Entering into, renewing, or giving effect to any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment or of continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended;

(c) Recognizing Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as the [fol. 52] representative of any of its employees, for the purpose of dealing with the Respondent concerning grievances,

labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said labor organization shall have been certified by the National Labor Relations Board;

(d) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said organization shall have been certified by the National Labor Relations Board;

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated, for any loss [fol. 53] of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the section entitled "The remedy," herein;

(b) Withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until said organizations

shall have been certified by the National Labor Relations Board;

(c) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this recommended order;

(d) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the said Regional Director, in writing, within twenty (20) days from the date of this Intermediate Report, [fol. 54] what steps the Respondent has taken to comply with the foregoing recommendations.

It is further recommended that, unless the Respondent shall, within twenty (20) days from the date of the receipt of this Intermediate Report, notify said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take action aforesaid.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, any party may, within twenty (20) days from the date of service of the order transferringt he case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a

brief in support of the Intermediate Report.[45] Immediately upon the filing of such statement of exceptions and/or briefs, the parties filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double [fol. 55] spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed, as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 19th day of October, 1950.

Sydner S. Asher, Jr., Trial Examiner.

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APPENDIX A

Notice to All Employees Pursuant to The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

[fol. 56] We will not encourage membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of our employees, by discrimi-

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[45] Exceptions and briefs must be received by the Board in Washington, D. C., *within* the specified period allowed. *Western Wear of California, Inc.*, 87 NLRB No. 159.

nating in regard to their hire and tenure of employment, or any term or condition of employment.

We will not enter into, renew, or continue in force and effect any agreement with Newspaper and Mail Deliverers' Union of New York and vicinity, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization, as a condition of employment or continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We will not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join, assist, or form any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We will withdraw and withhold all recognition from Newspaper and Mail Deliverers' Union of New York and Vicinity, or any successor thereto, as a representative of any of our employees for the purposes of dealing with us concerning [fol. 57] grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified by the National Labor Relations Board.

We will cease performing or giving effect to our contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and vicinity, or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with said organization relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless or until said organization shall have been certified by the National Labor Relations Board.

We will make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated, for any loss of pay they may have suffered as a result of our discrimi-

nation against them, in accordance with the recommendations of the Intermediate Report.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc., Employer.

Dated——by—— Representative——Title

This notice must remain posted for 60 day from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 58] BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

Transcript of Hearing of July 17, 1950

2 Park Avenue, New York, N. Y.

Met, pursuant to notice, at 2:00 o'clock P. M.
Before: Sidney S. Asher, Jr., Trial Examiner.

APPEARANCES:

Merton C. Bernstein, Esq. and Jerome Reiner, Esq., Counsel for the General Counsel.

Messrs. Bandler, Haas & Kass, By: Julius Kass, Esq., of Counsel and Richard L. Halpern, Esq., 11 Broadway, New York, New York, appearing for Gaynor News Company, Inc.

[fol. 59] Samuel Duker, Esq., 11 West 42nd Street, New York, N. Y. appearing for Newspaper & Mail Deliverers' Union of New York and Vicinity.

* * * * * * *

PROCEEDINGS

Trial Examiner Asher: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Gaynor News Company, Inc.

and Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity, Party to the Contract, Case No. 2-CA-605.

The Trial Examiner conducting this hearing is Sidney S. Asher, Jr.

Will counsel for the General Counsel and the various parties kindly state their appearances for the record?

For the General Counsel?

Mr. Bernstein: Merton C. Bernstein and Jerome A. Reiner, counsel for the General Counsel, 2 Park Avenue, New York City.

Trial Examiner Asher: For the respondent?

Mr. Kass: For the respondent, Gaynor News Company, Bandler, Haas and Kass, by Julius Kass and Richard L. Halpern, 11 Broadway, New York 4.

Trial Examiner Asher: For the charging party, any appearance?

Mr. Bernstein: No separate counsel for the charging party.

Trial Examiner Asher: For the intervener?

Mr. Duker: I presume that is us, sir?

Trial Examiner Asher: Right.

[fol. 60] Mr. Duker: Samuel Duker, 11 West 42nd Street, New York 18, New York.

* * * * * * *

Mr. Bernstein: Will you mark this as General Counsel's Exhibit No. 1 through 1-N?

(Documents referred to were marked for identification as General Counsel's Exhibit No. 1 through 1-n, respectively.)

OFFERS IN EVIDENCE

Mr. Bernstein: Counsel for the General Counsel requests the reporter to mark as General Counsel's Exhibit No. 1-A the original of the charge herein filed, February 1, 1949; as 1-B a return receipt dated February 3, 1949 indicating service of the charge upon Gaynor News Company, Inc.; an affidavit of service dated February 1, 1949 indicating service of the aforementioned charge upon Gaynor News Company, Inc. as 1-C; as 1-D, the original of an amended charge filed

on June 8, 1950; as 1-E, the return receipt dated June 13, 1950 indicating service of the aforementioned amended charge upon Gaynor News Company, Inc.; as 1-F, an affidavit of service of the amended charge dated June 9, 1950; as 1-G, the original of the notice of hearing dated June 13, 1950 as setting July 17, 1950 at 1:00 P. M. as the date and time of hearing; the original of the complaint herein as 1-H; as 1-I, the original return receipt dated June 16, indicating service of the notice of hearing and complaint upon Gaynor News Company; as 1-J, the return receipt dated June 14, 1950, indicating service of a notice of hearing and complaint herein upon Sheldon Loner, the charging party; as 1-K, a return receipt dated June 14, 1950, indicating service of the notice of hearing and the complaint upon Newspaper and [fol. 61] Mail Deliverers' Union of New York and Vicinity; as 1-L, an affidavit of service dated June 13, 1950 indicating service of a notice of hearing, complaint, charge and amended charge upon Gaynor News Company, Inc., Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity; as 1-M, the answer of respondent, Gaynor News Company, Inc.; and as 1-N, the answer of Newspaper and Mail Deliverers' Union of New York and Vicinity.

Trial Examiner Asher: Are you offering those into evidence?

Mr. Bernstein: Yes, I am, Mr. Examiner.

Trial Examiner Asher: Are there any objections, Mr. Kass?

Mr. Kass: My only objection is to the offer of Exhibit No. 1-N which apparently is an answer filed by the union, a copy of which we have neither received nor seen.

Trial Examiner Asher: Of course you have the right to examine it now since it has been offered into evidence. You have no objection to any of the other exhibits, General Counsel's Exhibits No. 1-A through 1-M, inclusive?

Mr. Kass: None whatsoever.

Mr. Duker: No objection.

Trial Examiner Asher: Hearing no objection, General Counsel's Exhibits 1-A through 1-M are admitted in evidence. As to 1-N, Mr. Duker, do you have any objection?

Mr. Duker: No objection.

Trial Examiner Asher: We will take a three-minute recess. I will reserve ruling on 1-N.

(Short recess.)

Trial Examiner Asher: The hearing will be in order.

Mr. Bernstein: Mr. Examiner, before your ruling on the acceptance or rejection of General Counsel's Exhibit 1-N, I [fol. 62] would like to note for the record that an inadequate number of the union's answers was filed with the Board. However, I didn't see fit to make a motion to strike the entire answer. I merely wish to note that for the record. I thought that deficiency would be made good.

Trial Examiner Asher: Will you be able to take care of that, Mr. Duker?

Mr. Duker: I will put them in the mail today when I get back to the office.

Trial Examiner Asher: I would like to point out to Mr. Duker that under Section 203.29 of the Board Rules and Regulations I am empowered to rule upon a motion to intervene, but no such motion is before me.

Mr. Duker: At this time I wish to make a formal motion to intervene. I understand it has to be in writing.

Trial Examiner Asher: It does not have to be in writing. It may be oral on the record at the hearing. However, do you desire it to be in writing?

Mr. Duker: I may as well, I have it here.

Mr. Kass: I assume that Mr. Duker will furnish us with a copy of that pleading rather than an exhibit.

Mr. Duker: I will make an oral motion, sir. At this time, I wish to move on the record that Newspaper and Mail Deliverers' Union of New York and Vicinity be permitted to intervene herein and appear as a party in this case.

Trial Examiner Asher: Well, I am going to rule on that motion before I rule on the admissibility of General Counsel's Exhibit 1-N. Under Section 203.29 of the Board Rules and Regulations, I can permit that intervention to such extent and upon such terms as I may deem proper. I am going to grant the motion to intervene in so far as the union will have the right to intervene with respect to the legality [fol. 63] of the contract or the alleged contract between it and the respondent, but for that limited purpose only.

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Trial Examiner Asher: I wish to read Section 203.38 of Board's Rules and Regulations:

"Any party shall have the right to appear at such hearing in person, by counsel or by other representative, to call, examine and cross-examine witnesses and to introduce into the record documentary or other evidence except that the participation of any party shall be limited to the extent permitted by the Trial Examiner."

I believe my ruling has covered that. I will therefore rule that General Counsel's Exhibit 1-N is admitted in evidence.

Mr. Kass: May I have an exception?

Trial Examiner Asher: Yes, you have an automatic exception to all adverse rulings.

(Whereupon, documents previously marked for identification as General Counsel's Exhibits 1-A through 1-N, were received in evidence.)

* * * * * * *

Mr. Bernstein: Mr. Examiner, I would like at this time to renew the General Counsel's motion to amend the complaint, Paragraph 10 of the complaint as stated on the record, and I have now provided the other parties with a copy of the proposed new language as stated upon the record.

Trial Examiner Asher: Suppose for the purposes of clarity you offer it in evidence as General Counsel's Exhibit 1-O?

[fol. 64] Mr. Bernstein: Certainly. However, it doesn't contain language to the effect that it is a motion, and merely contains the language which I wish to have substituted.

(Document referred to was marked for identification as General Counsel's Exhibit No. 1-O.)

Trial Examiner Asher: All parties have copies. This has been marked for identification as General Counsel's Exhibit 1-O.

Mr. Kass, I understand that you object to this amendment on the ground that it violates Section 10-B of the Act; am I correct, sir?

Mr. Kass: That's right, sir.

Trial Examiner Asher: Do you wish to be heard on that, Mr. Bernstein?

Mr. Bernstein: Yes, I do, quite briefly. For the most part, the amended section is the same as the paragraph which it supersedes. It adds only from the last comma, 10-A, "and which otherwise provided for the preferential treatment of union members." That is the only new part of the Section 10-A. It is a fairly minor matter which will be contained within the four corners of that agreement.

As to Section 10-B, it merely recites than an agreement has remained in force since October 25, 1948.

Trial Examiner Asher: I believe there is also a motion of Mr. Kass' which would embrace Paragraph 11. My recollection is that your motion, Mr. Kass, embraces Paragraphs 10 and 11.

Mr. Kass: That's right, sir.

Trial Examiner Asher: Do you wish to say anything, Mr. Duker, before I rule?

Mr. Duker: No, sir.

[fol. 65] Trial Examiner Asher: While the record shows that the charge was served on the respondent February 3, 1949, it therefore appears clear to me that the events of October 25, 1948, the alleged events related in Paragraphs 10, as amended, and 11 of the complaint occurred well within six months prior to the service. I will therefore deny the motion on the authority of Cathey Lumber Company, 86 NLRB 30.

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Trial Examiner Asher: I don't believe I have. Aside from the points already raised, Mr. Kass, do you have any other objections to the amendment of the complaint as submitted in writing by Mr. Bernstein, General Counsel's Exhibit 1-O?

Mr. Kass: We would like to reserve such right to file an appropriate reply to this amended answer prior to the termination of the formal proceedings.

Trial Examiner Asher: Very well, you can reserve such rights. With that understanding that the respondent shall have a right to answer the amended complaint before the termination of the formal hearings with that reserva-

tion the amendment is granted and Exhibit 1-O will be introduced into evidence.

(Whereupon, document previously marked for identification as General Counsel's Exhibit 1-O, was received in evidence.)

Mr. Bernstein: Will you mark this for identification, Mr. Reporter?

(Whereupon, document referred to was marked for identification as General Counsel's Exhibit No. 2.)

Mr. Bernstein: I now offer in evidence as General Counsel's Exhibit 2 a copy of a contract between Gaynor News [fol. 66] Company and the union dated October 25, 1948 which has heretofore been marked for identification as General Counsel's Exhibit No. 2. This is a conformed copy.

Trial Examiner Asher: Have you seen it, Mr. Kass?

Mr. Kass: No.

Trial Examiner Asher: Is there any objection, Mr. Kass?

Mr. Kass: None whatsoever.

Trial Examiner Asher: Is there any objection, Mr. Duker?

Mr. Duker: No objection.

Trial Examiner Asher: Hearing no objection, General Counsel's Exhibit No. 2 is admitted in evidence.

(Whereupon, document previously marked for identification as General Counsel's Exhibit No. 2, was received in evidence.)

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Mr. Bernstein: At this time counsel for the General Counsel moves to strike that portion of the union's answer entitled "And for a first separate and distinct defense," consisting of paragraph No. 3, as frivolous, irrelevant, immaterial, incompetent and insufficient in law, and in support of this motion——

Will you mark this General Counsel's Exhibit 3, please?

(Whereupon, document referred to was marked for identification as General Counsel's Exhibit No. 3.)

Mr. Bernstein: I ask that the Trial Examiner and the Board take official notice of its own records in the matter of Suburban Wholesalers Association, Case No. 2-UA-4890. To facilitate that process I wish to offer in evidence a copy of the petition in that named and numbered case as General Counsel's Exhibit No. 3, which has heretofore been marked.

[fol. 67] Trial Examiner Asher: Have you seen that, Mr. Kass?

Mr. Kass: No, sir.

Trial Examiner Asher: Will you pass that over to Mr. Kass?

(Paper handed to Mr. Kass.)

Mr. Kass: Would the counsel for the General Counsel give us—I am not familiar with these forms—would he give us some indication of what this is about so I know what to look for here?

Mr. Bernstein: Certainly, Mr. Kass. I was going to call the attention of the Trial Examiner to the fact that this petition for an election to authorize the union, Newspaper and Mail Deliverers' Union of New York and Vicinity, to authorize that union to enter into a union security agreement within the limitations provided by the Act. It will be noted that this petition which is the first, so far as I know, was filed on January 11, 1949, several months after the execution of the contract which is General Counsel's Exhibit 2.

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Mr. Bernstein: I wish also to refer the Trial Examiner to a portion of that exhibit which is referred to as the annex, in which there is named Gaynor News Company, 125 South 5th Avenue, Mount Vernon, New York.

Mr. Reporter, will you mark this for identification?

(Documents referrred to were marked for identification as General Counsel's Exhibits 4-A and 4-B.)

Mr. Bernstein: Further in support of this motion I wish to ask the Trial Examiner and the Board to take official notice of the Board's files and records in the mat-

[fol. 68] ter of Gaynor News Company, Case No. 2-UA-5448 and wish to offer in evidence what has heretofore been marked as general Counsel's Exhibits 4-A and 4-B, consisting respectively of a union authorization petition, Mr. Kass, dated December 19, 1949, in that named and numbered case and a withdrawal request in that named and numbered case which was approved on January 4, 1950. I now offer General Counsel's Exhibits 3, 4-A and 4-B.

Mr. Kass: May I ask the purpose again of the General Counsel?

Trial Examiner Asher: Mr. Bernstein.

Mr. Bernstein: Yes. I wish to note that the answer alleges, that the union's answer alleges that the Regional Director and the Board were dilatory and otherwise improperly delayed the processing of petitions, union authorization petitions which had been filed by the union. It is quite clear that at no time prior to the execution of the contract named in Section 10 of the complaint had the union attempted to secure the requisite authority.

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Trial Examiner Asher: Are you stating that proof that they filed a petition on January 11, 1949 is in itself proof that they never filed one before that?

Mr. Bernstein: No. I also stated at the beginning that I asked the Trial Examiner—I believe I stated this—to take official notice of the fact that these were the earliest petitions filed.

Mr. Kass: Mr. Examiner, how can you take judicial notice that these were the earliest petitions filed?

Trial Examiner Asher: Because the Board records will show all petitions filed.

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[fol. 69] Trial Examiner Asher: I think we have settled that. Very well, in view of the fact that the Trial Examiner will confine himself strictly to formal files that are open to public inspection, the motion requesting the Trial Examiner to take judicial [44] notice is granted with that restriction. And furthermore, General Counsel's Exhibits 3, 4-A and

4-B are admitted into evidence for whatever they may be worth.

(Whereupon, documents previously marked for identification as General Counsel's Exhibits 3, 4-A and 4-B, were received in evidence.)

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Mr. Bernstein: Mr. Examiner, just before proceeding I would like to refer to General Counsel's Exhibit 4-A which has been received in evidence and I would like it to appear for the record that in that petition the union herein alleged that Gaynor News Company was engaged in commerce within the meaning of Section 2, subsection 6, of the Act, a matter as to which it claims it has insufficient knowledge on which to base a belief in its answer.

Trial Examiner Asher: Will you be kind enough to refer the Trial Examiner to the section?

Mr. Kass: Mr. Examiner, for the sake of the record and for the sake of saving time, Gaynor News Company stipulates that for the purposes of this action it is subject to the jurisdiction of the Act of the National Labor Relations Board.

Trial Examiner Asher: Is that stipulation acceptable?

Mr. Bernstein: It is acceptable to me. Unfortunately, the union is not here to answer to it, and from its answer the allegations on which that is based are not admitted and therefore I feel that it will be necessary to go into the proof on that matter.

[fol. 70] Trial Examiner Asher: The stipulation will be received in so far as it is a stipulation between the respondent and the General Counsel.

Mr. Bernstein: You were asking me something, Mr. Examiner?

Trial Examiner Asher: Yes, I was asking you to refer me to the section of the petition which refers to commerce. I see that Section 4, Nature of Employer's Business, describes newspaper and magazine delivery.

Mr. Kass: Mr. Examiner, may I at this time say that Mr. Gaynor of the Gaynor News Company is here and has been here all afternoon. Now he's trying to run his business, and if there is any evidence that is required of him,

I wonder if he could be called out of turn so that he may testify and be excused.

Mr. Bernstein: I was about to call him right now. I will withdraw my statement. The petition referred to, General Counsel's Exhibit 4-A, does not effectively make that allegation.

Trial Examiner Asher: Very well, proceed.

Mr. Bernstein: Will Mr. James B. Gaynor take the stand, please?

JAMES B. GAYNOR was called as a witness by and on behalf of the General Counsel, and having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Bernstein:

Q. Mr. Gaynor, are you appearing here under subpoena?

A. I am.

Q. Are you employed by the Gaynor News Company, Inc.?

A. Yes.

[fol. 71] Trial Examiner Asher: Will you speak up, please?

The Witness: I am.

Q. In what capacity?

A. President.

* * * * * * *

Q. Mr. Gaynor, is the Gaynor News Company, Inc. a member of an Association?

A. It is.

Q. Would you tell me the name of that Association?

A. The Suburban Wholesalers.

Q. I ask you to direct your attention to the annex to General Counsel's Exhibit 3 and ask you whether that sets forth the names of the members of that Association (handing paper to the witness)?

A. Yes, I believe it does.

Mr. Bernstein: I would ask the Trial Examiner to note that that annex sets forth the names of several companies. One further question before that.

Q. Are the companies listed there at the locations which the annex sets forth? Are they placed in the proper states?

A. Yes, I would say they are in the proper states.

Mr. Bernstein: I ask the Trial Examiner to note that the Association is composed of members which have their places of business in the States of New York and New Jersey.

Trial Examiner Asher: The Examiner will so note. Continue.

Q. Mr. Gaynor, I show you General Counsel's Exhibit 2. That contract was signed by you, was it not?

A. I presume this is a copy of the contract that was signed by me.

Q. Did you participate in the negotiation of that contract?

A. Yes.

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By Mr. Bernstein:

Q. Mr. Gaynor, I once again show you General Counsel's [fol. 72] Exhibit No. 2, in evidence, and ask you whether that is still in force and effect between the Respondent and the Newspaper and Mail Deliverers' Union of New York and Vicinity. I might point out, Mr. Gaynor, that that has already been received in evidence, and I am merely asking whether the contract which has been identified is still in force?

A. Oh, yes, that is still in force.

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TRANSCRIPT OF TESTIMONY AT HEARING OF JULY 18, 1950

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JAMES B. GAYNOR, resumed the stand and testified further as follows:

Direct examination (Continued):

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Mr. Kass: May I for the record now make clear that the respondent, Gaynor News Company, will never raise any question in this case with reference to the interstate character of its business. It reiterates and restipulates that it is subject to the Act, and openly here at this hearing says that it never will raise any question involving the jurisdiction of the Board.

Trial Examiner Asher: Do we have such a stipulation on the record, incidentally, between the respondent and General Counsel? If not, this is an offer to stipulate.

Mr. Bernstein: I will so stipulate.

Trial Examiner Asher: All right, it is stipulated between the respondent and General Counsel that the respondent is [fol. 73] engaged in interstate commerce within the meaning of the Act. Is that correct?

Mr. Kass: That's correct.

* * * * * * *

Q. In the year 1949, Mr. Gaynor, did Gaynor News Company, Inc. grant vacations to employees doing the work of chauffeurs, distributors, routemen, tiers, floor men, wrapper-writers, relay men?

* * * * * * *

A. To the best of my knowledge I believe that vacations were given in accordance with our present contract.

Trial Examiner Asher: With pay is that?

The Witness: Yes.

Q. Were such payments made on the same basis to union employees and non-union employees?

A. Offhand I would believe so. I have not checked the records on that.

* * * * * * *

Mr. Bernstein: Would you mind marking this as General Counsel's Exhibits 9-A and 9-B.

(The documents above referred to were marked General Counsel's Exhibits 9-A and 9-B, for identification.)

Mr. Bernstein: I ask the Trial Examiner and the Board to take official notice of its records in the matter of Gaynor News Company, Inc. Case No. 2-UA-4273 and to facilitate that process, I am offering in evidence as General Counsel's Exhibits No. 9-A and 9-B, a copy of the petition in that case, and a copy of the withdrawal request that was approved by the Regional Director in that same named case.

Trial Examiner Asher: Is there any objection to the [fol. 74] admission of General Counsel's Exhibits 9-A and 9-B, Mr. Kass?

Mr. Kass: Well, I thought that in view of the fact that this involves a matter concerning the union, that the union ought to answer first.

Trial Examiner Asher: Well, the union isn't here to express any objections it might have.

Mr. Kass: In view of that fact, I have no objection on behalf of Gaynor News Company.

Trial Examiner Asher: Hearing no objections, General Counsel's Exhibits 9-A and 9-B will be received into evidence. In view of the fact of their introduction the Trial Examiner will have a further question to ask of the witness.

(The documents heretofore marked General Counsel's Exhibits 9-A and 9-B for identification, were received in evidence.)

* * * * * * *

James B. Gaynor re-called:

Trial Examiner Asher: Mr. Gaynor, I show you General Counsel's Exhibit 2, the contract between the union and Gaynor News and ask you to look at paragraph 19-a. Have you looked at that, sir?

The Witness: Yes, sir.

Trial Examiner Asher: Can you tell me whether or not, to your knowledge, what the expiration date of the contract between the union and the Publishers Association of New York might be that is referred to in paragraph 19-a?

The Witness: The expiration date of the Publishers contract?

[fol. 75] Trial Examiner Asher: That's right, sir.

The Witness: I believe the expiration date would have been——

Mr. Kass: October 25, 1950.

The Witness: Are you asking the expiration date of the present contract?

Trial Examiner Asher: No, of the contract referred to in Section 19-a.

The Witness: October 25, 1950.

Trial Examiner Asher: That is to the best of your knowledge?

The Witness: Expiration date of the Publishers contract.

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Mr. Bernstein: Mr. Santomenna, take the witness stand, please.

Dominick Santomenna, a witness called by and on behalf of the General Counsel, having first been duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Bernstein:

Q. What is your address?
A. Home address?
Q. Home address.
A. 14 Winslow Circle, Tuckahoe, New York.
Q. By whom are you employed?
A. Gaynor News Company.

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Q. In what capacity?
A. Assistant supervisor.
Q. Mr. Santomenna, in 1949 did Gaynor News Company, Inc. make or award vacations to employees in the delivery department?
A. In 1949?

[fol. 76] Q. 1949?

A. Yes, they did.

Q. Were they granted to all employees equally, whether they were members of Newspaper and Mail Deliverers' Union of New York and Vicinity or not members of that organization?

A. Yes, yes.

Q. Were vacations granted to employees in the delivery department in 1948?

A. Yes, sir.

Q. Were vacation payments in lieu of actual vacation made to employees in the delivery department for the year 1948 after October 25, 1948?

A. I don't remember that. I couldn't answer that definitely right now.

Q. You could not answer that definitely?

A. No. In 1948, did you say?

Q. 1948.

A. Just repeat that question, please.

Q. Were vacation payments made to employees in the delivery department in lieu of vacations?

A. Instead of taking their vacations, work it out?

Q. That's correct, yes, after October 25, 1948?

A. Yes.

Q. Were such payments made to all employees whether or not they were members of the union?

A. As far as I understand, yes.

* * * * * * *

LEON ASCHE, a witness called by and on behalf of the General Counsel, having first been duly sworn, was examined and testified as follows:

Direct Examination:

By Mr. Bernstein:

Q. What is your address, please?

A. 231 South Fulton Avenue, Mt. Vernon, New York.

Q. Mr. Asche, are you an employee of the Gaynor News Company, Inc.?

A. Yes, I am.

[fol. 77] Q. In what capacity are you employed?

A. Manager of the bookkeeping department.

Q. How long have you held that position?

A. About 9 years.

Q. What are your duties as the manager of the bookkeeping department?

A. To supervise the keeping of the books and the payrolls for the Gaynor News Company.

Q. Does that include the supervision of all payments that are made to employees?

A. Right.

Q. In 1949, Mr. Asche, did Gaynor News Company, Inc. grant vacations to its employees?

A. Yes.

Mr. Kass: I object to the question on the ground that it is beyond the scope of the complaint.

Mr. Bernstein: The Examiner has already ruled on it in connection with other witnesses.

Trial Examiner Asher: Yes, I will overrule the objection for the same reasons that I gave before, subject, however, to a motion to strike if it isn't tied in. I believe that was my ruling last time.

Mr. Kass: That's right, sir.

Q. The answer was yes?

A. I believe it was yes.

Q. Were such payments made equally to the members of the Newspaper and Mail Deliverers' Union of New York and non-members of that organization?

A. What year?

Q. 1949.

A. I believe yes.

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By Mr. Bernstein:

Q. Mr. Asche, in 1948, sometime after October 25, were payments made to employees in the delivery department of Gaynor in lieu of vacations?

A. 1948?

Q. After October, 1948.

A. Yes, sir, I believe so.

[fol. 78] Trial Examiner Asher: Will you speak up, please, Mr. Asche?

The Witness: The answer is yes.

Q. And such payments were made before January 1, 1949?

A. I don't believe so.

Q. At what date were vacation payments for the year 1948 made?

A. They started January, 1949.

Q. At what date were payments made for vacations earned in 1947?

A. In 1948.

Q. When in 1948?

A. Started January, 1948.

Q. What vacation payments were made starting in January 1, 1948?

A. What vacation payments were made?

Q. That's right. What was the basis for the payments?

A. The basis? Well, the basis was for the number of days worked in '47.

Q. Such vacations were actually taken; is that correct?

A. That's right.

Q. Up to October 25, 1948. Were additional payments made for vacations earned in 1947 after October 25, 1948?

A. Additional vacations for 1947?

Q. That's right.

A. I don't recollect that. I believe there was.

Mr. Kass: Mr. Examiner, so that we can save time, to explain the situation, the contract prior to General Counsel's Exhibit 2 provided for two weeks vacation. By virtue of the contract identified as General Counsel's Exhibit 2 a three-week vacation was provided for. Because of the fact that it had been established as general practice in other branches of the industry, and despite the fact that under the contract we were not obligated to give our employees a [fol. 79] third week of retroactive vacation, in the interests of good labor relations and to maintain peace with the union, and not to have a different standard apply throughout the industry, we voluntarily granted those of our employees who were with us a third week's vacation.

Trial Examiner Asher: This is an actual vacation period, and not pay in lieu of vacation?

Mr. Asche: We gave them the money.

Trial Examiner Asher: You paid them in lieu of that extra vacation?

Mr. Kass: That's right.

Trial Examiner Asher: Is that offered as a stipulation?

Mr. Kass: I don't know how to denominate my representations here any more.

Trial Examiner Asher: Suppose I just ask the witness if that is a correct statement, if he knows. Do you know if the statement that Mr. Kass just made is a correct statement?

The Witness: Yes, it is.

Mr. Bernstein: I object to the question being put to the witness in as much as it contains self-serving declarations, conclusions of law, as to what the contract called for, and things of that sort.

Mr. Kass: All self-serving declarations and conclusions of law implied within the statement are expunged, nullified, *nunc pro tunc* and of no effect whatsoever.

Trial Examiner Asher: I am going to withdraw my question. I thought maybe I could help matters along here, but I see that it did not have that effect.

[fol. 80] Are you offering that as a stipulation?

Mr. Kass: I would like it to be accepted as a stipulation.

Trial Examiner Asher: Will you join in that stipulation?

Mr. Bernstein: I would prefer to continue with the examination of the witness.

Mr. Kass: I am sure it will take an hour for it to be clarified by a question and answer situation, and I can clear it up in three minutes.

Trial Examiner Asher: You see that was what I was attempting to do with my question. Maybe we could work it that way, but Mr. Bernstein, it is entirely up to you how you want to go about it.

Mr. Bernstein: I prefer to ask questions.

By Mr. Bernstein:

Q. After October 25, 1948, Mr. Asche, were more generous vacations given to employees in the delivery room?

A. What do you mean by more generous vacations?

Q. Just a moment, let me finish the question—than had been contemplated on January 1, 1948?

A. You mean if a third week was given to employees of the delivery department, I would say yes.

Q. And the third week was based upon a full year's work; is that correct?

A. That's right.

Q. Now, if an employee had worked less than a full year in 1947, vacation credit was pro-rated?

Mr. Kass: I object to the question on the ground that it is argumentative, that Section 9 of Exhibit No. 2 speaks for itself.

Mr. Bernstein: I am asking what was done, not what was [fol. 81] provided for. You can contract all day and not do anything.

Trial Examiner Asher: I will overrule the objection and allow the witness to answer the question.

A. That question is hard to answer because I haven't got all the records here.

Q. Let me show you Schedule B of General Counsel's Exhibit No. 2 and ask you whether that schedule was followed after October 25, 1948?

A. That schedule was followed. The vacation pay for 1947 was based on this schedule.

Q. Prior to October 25, 1948 were vacations granted according to a schedule that provided for less vacations to employees in the delivery room for the year 1948?

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A. I would like to clear this up. You mean vacation?

Q. That were granted in 1948.

A. They were based on a two-week schedule on days worked in 1947.

Q. However employees who worked for less than a whole year in 1947 got vacations of less than two weeks; is that correct?

A. According to the schedule.

Q. After October 25, 1948, were the additional benefits granted to both members of the Newspaper and Mail Deliverers' Union of New York and Vicinity and to non-members of that organization?

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A. You mean the additional vacation benefits?

Q. That's correct.

A. The answer is no.

[fol. 82] Q. To whom was that granted?

A. Union members only.

Q. To whom were they not granted?

A. Non-union members.

Q. At that time was Sheldon A. Loner an employee of Gaynor News Company, in the fall of 1948?

A. Yes, he was.

Q. Could you tell me how many days he worked in the year 1947?

A. How many days he worked?

Q. How many days?

A. Can I look at my exhibit here?

Q. You may.

A. According to my records it was 101 days in 1947.

Q. Did Mr. Loner receive any vacation in 1948?

A. No.

Q. Was Mr. Loner employed after October 25, 1948?

A. Yes, for a short while.

Q. Could you give me the beginning and terminal dates starting with October 25.

A. The termination date was 12/3/48.

Trial Examiner Asher: What was that date again?

The Witness: 12/3/48.

Q. Was Mr. Loner a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity?

A. As far as I know, no.

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Q. How many non-union employees were there working in the delivery room in the period October 25, 1948 to January 1, 1949?

Mr. Kass: There is no testimony that this witness knows.
A. I don't know offhand.
Trial Examiner Asher: Of course, I take it that the witness realizes that if there is a question asked him that he [fol. 83] does not know the answer, he is free to reply, "I do not know". I will so instruct the witness.
The Witness: I don't know offhand.

Q. Was there more than one?
A. Yes.

Trial Examiner Asher: That is non-union employees you are talking about?
Mr. Bernstein: Non-union employees.

Q. Was Mr. Loner given any payment in lieu of vacation in 1948?
A. No.
Q. Were the other non-union employees given any payment in lieu of vacation payment in the year 1948?
A. No.

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By Mr. Bernstein:

Q. Were there other non-union employees employed in the delivery department in the fall of 1948 who had worked more than fifteen days in the year 1947?
A. I believe yes.
Q. Was there more than one?
A. Yes.

Mr. Kass: I have a standing objection to this line of testimony.
Trial Examiner Asher: That's correct, sir; the record will so show.

Q. Were retroactive wage payments made to employees in the fall of 1948?
A. Yes.
Q. On approximately what date was that payment made?
A. I don't have the exact date. I believe it was made in November.

Q. During the month of November?
A. November, I believe.

Trial Examiner Asher: That is 1948?
The Witness: 1948, right.

[fol. 84] Q. And did that retroactive wage payment cover the period from July 17, 1948 to October 25, 1948?
A. I believe so.

* * * * * * *

Q. In what manner was the retroactive wage payment computed, Mr. Asche?
A. Well, the manner it was paid was the difference between the old rate of $14.96 a night and the new rate which was $16.41 a night.
Q. And that was for each day worked between July 17, 1948 and October 21, 1948; is that correct?
A. That's right.
Q. And the difference between those two rates is $1.45 per day; is that correct?
A. Yes.
Q. Were additional payments made for overtime work during that period, July 17, 1948 to October 25, 1948?
A. You mean additional retroactive overtime?
Q. That's correct.
A. That's right.
Q. Would you tell me how that was computed?
A. Well, we computed the rate per hour at time and a half.
Q. And the difference between the two rates per hour was the difference paid for each overtime hour; is that correct?
A. That's right.
Q. If hours were worked in excess of four hours over in one night, would a full day's payment of $1.45 be made for that overtime?
A. An excess of four hours?
Q. That's correct.
A. No.
Q. Merely an hourly rate of pay?
A. An hourly overtime rate was paid.

Q. Which represented the difference between the hourly overtime rates?

A. Yes.

[fol. 85] Trial Examiner Asher: Those figures of $16.41 and $14.96 respectively were for a standard eight-hour day?

The Witness: Right.

Trial Examiner Asher: So that the difference of $1.45 per day is more or less a difference of 18 cents per hour straight time?

The Witness: I believe so.

Trial Examiner Asher: Or 27 cents per hour overtime?

The Witness: Right.

Q. To whom were such payments made?

A. Union men.

Q. Were any such payments made to non-union men?

A. No.

Q. Did Sheldon Loner work from the period July 17, 1948 to October 25, 1948?

A. Yes.

Q. Did other non-union men work during the period July 17, 1948 to October 25, 1948?

A. I believe so.

Mr. Bernstein: I have no further questions to ask of this witness.

Trial Examiner Asher: Mr. Kass, cross examination?

Mr. Kass: No questions.

Trial Examiner Asher: Mr. Asche, you have testified that certain payments were made to union men only. How did you know which men were union and which men were not in order to determine whether to make payments to them or not?

The Witness: I was told through Mr. Gaynor.

Trial Examiner Asher: Did Mr. Gaynor supply you with a list?

[fol. 86] The Witness: With a record, not with a list. We were supplied with employees record cards which are marked union if they are union.

Trial Examiner Asher: Do you have such a record card for each employee on the payroll?

The Witness: That's right.

Trial Examiner Asher: And opposite each employee's name on these cards is shown whether or not he is a union member?

The Witness: That is the only way I know of, who are members and who are not.

Trial Examiner Asher: You have seen those cards?

The Witness: Yes.

Trial Examiner Asher: And you used those cards as a guide?

The Witness: Right.

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Trial Examiner Asher: Let me ask Mr. Kass some questions. Assuming for the purpose of argument that Mr. Loner had attempted to become a member of the union, and had been unsuccessful in doing so, what is your theory as to how that would affect the question of whether or not the respondent is guilty of unfair labor practices?

Mr. Kass: I can state that very simply. I know as a matter of fact that Mr. Loner had for some time, and has for some time attempted to become a member of this union. I know that he has been unsuccessful in becoming a member of this union because of the restrictions of the union upon [fol. 87] its membership. I therefore contend on behalf of Gaynor News Company that because of his overwhelming, his burning, his intense desire to become a member of this union that there was nothing we could do that would encourage him to membership because he was already trying to become a member of that union. And that is our case.

* * * * * * *

Sheldon Loner was called as a witness by and on behalf of the Respondent, and having first been duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Kass:

Q. Where do you live, Mr. Loner?

A. 1495 Plimpton Avenue, in the Bronx.

Q. How old are you?
A. Twenty-three.
Q. Where do you work?
A. At the present time?
Q. That's right.
A. S. G. Products, 1220 Broadway.
Q. For how long were you an employee of the Gaynor News Company?
A. Approximately a year and a half.

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A. Well, it seems natural that I did make a demand. I asked them for it—not exactly.
Q. Who did you ask for the money?
A. The party.
Q. Yes.
A. I spoke to Mr. Murray Levine.
Q. Who is Mr. Murray Levine?
A. He is the foreman.
Q. When did you speak to him?
A. I'd say it was within a couple of days after the retroactive pay was given.
[fol. 88] Q. Well, what date was that?
A. Sometime in the middle of November, 1948.
Q. So that sometime in the middle of November, a few days after the retroactive pay was paid you asked Murray Levine for your money; is that correct?
A. No.
Q. What did you do?
A. I asked Murray Levine, "Do I get retroactive pay?"
Q. What did he say to you?
A. He said I was not entitled to it since I wasn't a member of the union.
Q. You weren't a member of the union, were you?
A. No.

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JAMES B. GAYNOR re-called on behalf of the Respondent:

Trial Examiner Asher: I will remind you, Mr. Gaynor, you are still under oath.

Direct examination:

By Mr. Kass:

Q. I show you a copy of contract dated 2nd day of January, 1946 between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity and ask whether this is a true copy of the collective bargaining agreement negotiated between your company and the union?
A. This is a true copy.

Mr. Kass: I offer the exhibit in evidence, Exhibit 1 on behalf of the respondent.

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Mr. Bernstein: I have no objection to Respondent's Exhibit 1.
Trial Examiner Asher: Hearing no objections, Respondent's Exhibit 1 is received in evidence.

[fol. 89] (The document heretofore marked Respondent's Exhibit No. 1 for identification, was received in evidence.)

Q. Mr. Gaynor, I show you supplementary agreement between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity, dated October 18, 1948, and ask whether that is a true copy of the agreement executed by Gaynor News Company and the union?

Trial Examiner Asher: Suppose we mark that Respondent's Exhibit 2 for identification?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

A. It is.

Mr. Kass: I offer it in evidence. May I say it was returned to us by the Examiner, Mr. Eisenberg at the same time that Exhibit 1 Respondent was returned. It was attached thereto.

Mr. Bernstein: No objection.

Trial Examiner Asher: Hearing no objection Respondent's Exhibit 2 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 2 for identification, was received in evidence.)

* * * * * * *

Q. Do you have personal knowledge, Mr. Gaynor, as to the payments made to your employees by virtue of contracts?

A. I do.

* * * * * * *

Q. I am making reference to retroactive wage payments made to union employees for the period covering July 17, [fol. 90] 1948 to October 24, 1948. Were those payments made to the members of the union in your employ at your direction?

A. They were.

* * * * * * *

Q. Mr. Gaynor, were you the official of the Gaynor News Company who issued the orders that after the effective date of the present contract, the one dated October 24, 1948 and identified in the proceedings as General Counsel Exhibit No. 2, are you the official of the company who issued orders not to give increased vacation benefits to non-union employees?

A. Would you read that question back?

(Question read.)

A. Yes, I am.

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TRANSCRIPT OF HEARING OF JULY 19, 1950

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JAMES B. GAYNOR resumed the stand, and further testified as follows:

Cross-examination.

By Mr. Bernstein:

Q. Mr. Gaynor, you were actively engaged in the operation of Gaynor News Company, Inc., in January 1946?

A. I was.

Q. And you have been since that time?

A. That is correct.

[fol. 91] Q. Mr. Gaynor, in 1946, prior to the execution of the contract which is Respondent's Exhibit No. 1 in evidence, were there non-union employees employed in the delivery department of Gaynor?

A. I believe that there were.

Q. And were there non-union employees from that time to the present always employed in the delivery department of Gaynor?

A. I believe that is correct.

• • • • • • •

Mr. Kass: Mr. Examiner, may I invite your attention to the fact that there are no allegations in the complaint challenging the validity of the contract dated July 2, 1946? This complaint questions the legality of the current contract, the one executed October 25, 1948. There are no allegations whatsoever with reference to the old contract.

We attempted to show you yesterday, and there was strenuous objection by counsel for the General Counsel to the open and honest admission of testimony when the complaining witness, Sheldon Loner, was on the stand, and I hope that you recall that I asked him whether he was a member of the union, whether he had tried to become a member of the union, and I wanted to introduce testimony which brought into the open the entire question of what this complaining witness wanted to do with reference to the union.

Counsel for General Counsel, for reasons best known to himself, wanted to hide the full facts from the examiner, and evidently from the courts. What could be gained by that concealment is beyond my comprehension. But, anyway, he made the concealment, and he wanted to hide the facts.

[fol. 92] We wanted to tell you yesterday that by virtue of that agreement of January 2, 1946, we had a contract where we were bound to employ exclusively members of the union, and we wanted to tell you that by virtue of that contract, when Sheldon Loner took a job there, when he got that job through the aid and assistance of the business agent of the union, Leon Bronstein, who, again, the counsel for the General Counsel did not permit to testify, to give you the entire facts—this boy knew that he could be bumped out of his job when a union man applied for the job. That was the contract and that was the law, under the old Wagner Act. The Colgate-Palmolive-Peet case, which I cited to you yesterday, decided by the United States Supreme Court on December 5, 1949, in a strong opinion by Judge Minton, upheld the validity of that contract and ruled that the policy of the Board, where they attempted to attack that type of contract and discharges under that type of contract, was censorable.

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[fol. 63]

GENERAL COUNSEL'S EXHIBIT 1-A.

Form NLRB-501
(12-48)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

Budget Bureau No. 64-ROO 1.1
Approval Expires Nov. 30, 1949

IMPORTANT—READ CAREFULLY	DO NOT WRITE IN THIS SPACE
Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.	Case No. 2 CA 605
	Date Filed 2/1/49
INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.	Compliance Status Checked by:

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

Name of Employer Gaynor News Co. Mt. Vernon 4-4000	No. of Workers Employed 60
Address of Establishment (Street and No., City, Zone and State) 125 South 5th Avenue, Mount Vernon, New York	Nature of Employer's Business Distribution of Newspapers and Periodicals

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act. (List subsections)

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc. If more space is required, attach additional sheets)

Since July 20, 1947, and at all times thereafter, the above-named employer has paid the undersigned lower wages than members of the Newspaper and Mail Deliverers Union, hereinafter called the Union, and has refused to pay the undersigned the retroactive pay for the period from July 17, 1948 to October 31, 1948, and the vacation and premium holiday pay that it paid members of the Union, for the reason that the undersigned was not a member of the Union and has thereby encouraged membership in the Union in violation of Section 8 (a) (3) of the Act.

[fol. 94]

By the above acts and by each of said acts, the above-named employer has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) thereof.

(Received 12:55)
(Feb. 1 1949)
(Second Region)
(New York, N. Y.)
(NLRB)

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge
Sheldon A. Loner

4. Address (Street and No., City, Zone, and State) — Telephone No.
1495 Plimpton Avenue, Bronx, New York — Je 7-9591

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. Address of National or International, if any (Street and No., City, Zone, and State) — Telephone No.

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By SHELDON A. LONER
(Signature of representative or person filing charge)

(Date) — (Title, if any)

Wilfully False Statements on This Charge Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 95]

GENERAL COUNSEL'S EXHIBIT 1-D.

Form NLRB-501
(12-49)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
AMENDED CHARGE AGAINST EMPLOYER

Budget Bureau No. 64-ROO 1.1
Approval Expires Nov. 30, 1950

IMPORTANT—READ CAREFULLY	DO NOT WRITE IN THIS SPACE
Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.	Case No. 2-CA-605
	Date Filed 6/8/50
INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.	Compliance Status Checked By:

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

Name of Employer	Number of Workers Employed
GAYNOR NEWS CO., INC.	60
Address of Establishment (Street and number, city, zone and State)	Nature of Employer's Business
125 South 5th Avenue, Mount Vernon, New York	Distribution of Newspapers and Periodicals

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

(List subsections)

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since August 1, 1948, and at all times thereafter, the above-named Employer has failed and refused to pay the undersigned the retroactive pay for the period from on or about July 17, 1948 to on or about October 31, 1948, and the vacation pay that it paid members of the Newspaper & Mail Deliverers Union of New York, and vicinity, for the reason that the undersigned was not a member of that Union, thereby encouraging membership in that Union in violation of Section 8(a) (3) of the Act.

[fol. 96]

By the above acts and by the execution, on or about October 25, 1948, of an illegal contract requiring membership in the aforementioned union, the above-named Employer has contributed illegal support to the aforementioned union in violation of Section 8(a) (2) of the Act.

By the above acts and by each of said acts, the above-named Employer has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a) (1) thereof.

(Received 9:30)
(Jun 8 1950)
(Second Region)
(New York, N. Y.)
(NLRB)

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge
SHELDON A. LONER

4. Address (Street and number, city, zone, and State) — Telephone No.
1495 Plimpton Avenue, Bronx, New York. — JE 7-9591

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. Address of National or International, if any (Street and number, city, zone, and State) — Telephone No.

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By SHELDON A. LONER
(Signature of representative or person filing charge)
Sheldon A. Loner

June 6, 1950
(Date)

(Title, if any)

Willfully False Statements on This Charge Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 97] GENERAL COUNSEL'S EXHIBIT 1-H

United States of America

Before the

National Labor Relations Board

Second Region

In the Matter of Gaynor News Company, Inc., and Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity, Party to the Contract.

Case No. 2-CA-605

Complaint

It having been charged by Sheldon A. Loner, 1495 Plimpton Avenue, New York, New York, that Gaynor News Company, Inc., 125 South Fifth Avenue, Mount Vernon, New York, herein referred to as Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, as amended, 61, Stat. 136, 29 U. S. C., Supp. I, Sec. 151, *et seq.*, herein referred to as the Act, the General Counsel of the National Labor Relations Board, [fol. 98] on behalf of the Board, by the Acting Regional Director for the Second Region, designated by the Board's Rules and Regulations—Series 5, as amended, Section 203.-15, hereby issues this Complaint and alleges as follows:

1. A copy of the Charge herein was served by registered mail upon Respondent on February 3, 1949. A copy of the Amended Charge herein was served by registered mail upon Respondent on or about June 12, 1950.

2. Respondent is and has been since 1937 a corporation duly organized under and existing by virtue of the laws of the State of New York.

3. At all times herein mentioned, Respondent has maintained its principal office and places of business at 125 South Fifth Avenue and 225 South Fourth Avenue, in the City of Mount Vernon, County of Westchester, and State of New York, and is now and has been continuously engaged at

said places of business in the purchase, sale, wholesale distribution and delivery of newspaper-, magazines and periodicals.

4. During the year ending January, 1949 Respondent, in the course and conduct of its business operations, caused to be purchased, transferred and delivered to its places of business in New York newspapers, magazines and periodicals valued in excess of $500,000, of which approximately 1 percent was transported to its said places of business in New York in interstate commerce from states of the United States other than the State of New York.

5. During the year ending January, 1949 Respondent, in the course and conduct of its business operations, sold and delivered newspapers, magazines and periodicals [fol. 99] valued in excess of $1,000,000, of which approximately 25 percent was transported from its said places of business in New York in interstate commerce to states of the United States other than the State of New York.

6. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

7. Newspaper and Mail Deliverers' Union of New York and Vicinity, herein referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

8. On or about October 25, 1948 Respondent instituted an increased wage rate and other benefits for those of its employees performing the operations of chauffeurs, distributors, route men, tiers, floor men, wrapper writers, relay and Canada men.

9. At all times herein mentioned Respondent did discriminate in regard to hire or tenure of employment of those of its employees in the categories set forth in paragraph 8 hereof who were not members of the Union, including Sheldon A. Loner, in that:

(a) In or about October or November, 1948 it paid to each of its employees in the categories described in paragraph 8 hereof who were members of the Union a sum of money as retroactive wages for the period from in or about July, 1948, to and including in or about October, 1948, and has failed and refused, and continues to fail and refuse, to pay similar retroactive wages to each of its employees in the categories described in paragraph 2 hereof who were

employed during that time and who were not members of the Union, including employee Sheldon A. Loner;

[fol. 100] (b) In or about October or November, 1948, Respondent awarded and granted to each if its employees in the categories described in paragraph 8 hereof who were members of the Union vacation with pay or the equivalent pay in dollars therefor, and has failed and refused, and continues to fail and refuse, to award and grant similar vacations with pay or the equivalent pay in dollars therefor to each of its employees in the categories described in paragraph 8 hereof who were employed at that time and who were not members of the Union, including employee Sheldon A. Loner.

10. Respondent and the Union did on or about October 25, 1948 enter into a collective bargaining agreement relating to terms and conditions of employment of Respondent's employees in the classifications set forth in paragraph 8 hereof, which agreement required as a condition of continued employment by the Respondent membership in the Union.

11. The agreement described above in paragraph 10, any amendment, modification, supplement, renewal or extension thereof is invalid and in violation of the Act and interferes with, restrains and coerces Respondent's employees in the exercise of rights guaranteed by the Act.

12. By the acts described above in paragraphs 8, 9, 10 and 11, Respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employees named above in paragraphs 8 and 9, thereby encouraging membership in the Union, and Respondent thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

[fol. 101] 13. By the acts described above in paragraphs 8, 9, 10 and 11, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a) (2) of the Act.

14. By the acts described above in paragraphs 8, 9, 10 and 11, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage

in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

15. The activities of Respondent, described above in paragraphs 8, 9, 10 and 11, occurring in connection with the operations of Respondent, described above in paragraphs 2, 3, 4, 5 and 6, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 8(a) (1), (2), (3) and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Second Region, on this 13th day of June, 1950 issues this Complaint against Gaynor News Company, Inc., respondent herein.

James A. Jaffee, Acting Regional Director, National Labor Relations Board, 2 Park Avenue, New York 16, New York.

[fol. 102] General Counsel's Exhibit 1-M

United States of America

Before the

National Labor Relations Board

Second Region

In the Matter of Gaynor News Company, Inc. and Sheldon A. Loner and Newspaper and Mail Deliverers' Union of New York and Vicinity, Party to the Contract.

Case No. 2-CA-605

Answer

An emended complaint having issued on the 13th day of June, 1950 by James A. Jaffee, Acting Regional Director, National Labor Relations Board, Second Region, against

Gaynor News Company, Inc., 125 South Fifth Avenue, Mt. Vernon, New York, herein referred to as "Respondent" alleging that Respondent has engaged in and is now engaged in certain unfair labor practices affecting commerce [fol. 103] as set forth and defined in the National Labor Relations Act, as amended, the Respondent, by its attorneys, Bandler, Haas & Kass, hereby answers the amended complaint as follows:

1. Admits the allegations of paragraphs numbered "1", "2" and "3".

2. Admits the allegations of paragraph numbered "4" and further alleges that its delivery, distribution and related activities were entirely confined to the State of New York.

3. Admits the allegations of paragraphs numbered "5", "6", "7" and "8".

4. Respondent denies the allegations of paragraph numbered "9".

5. Admits the allegations of paragraph numbered "9. (a)", except that it admits that it "refused to pay such sum" only in the sense that it failed to make such payment.

6. Admits the allegations of paragraph numbered "9. (b)", except that it admits that it "refused to grant such vacations" only in the sense that it failed to grant them.

7. Denies the allegations of paragraph numbered "10" except that it admits the entering into of the collective bargaining agreement relating to terms and conditions of employment of Respondent's employees in the classifications set forth in paragraph numbered "8" of the complaint.

[fol. 104] 8. Denies each and every allegation in paragraphs numbered "11", "12", "13", "14" and "15".

Dated: June 22, 1950.

Bandler, Haas & Kass, Attorneys for Respondent, Office and P. O. Address, 11 Broadway, New York 4, N. Y.

State of New York,
County of New York, ss:

Richard L. Halpern, being duly sworn, deposes and says:

That he is associated with the firm of Bandler, Haas & Kass, attorneys for the Respondent, in the above entitled proceeding; that the reason why this verification is made by deponent and not by an officer of the Respondent is that such an officer is not at the present time within the City of New York and it is difficult to obtain verification by an officer of the Respondent within the time allowed for this answer; that the above answer is true to the knowledge of deponent.

Richard L. Halpern.

Sworn to before me this 22nd day of June, 1950. Constance B. Willcher (Epstein), Notary Public, State of New York. No. 30-9676750. Qualified in Nassau County. Certs. filed in N. Y. Co. Clks. & Reg. Off. Term Expires March 30, 1952.

[fol. 105] State of New York,
County of New York, ss:

Carl Sichel, being duly sworn, deposes and says, that on the 22nd day of June, 1950, he served the within answer upon Sheldon A. Loner, the complainant in the within action, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Sheldon A. Loner, 1495 Plimpton Avenue, New York, N. Y.

and by depositing the same in the post office box regularly maintained by the United States Government at 11 Broadway, Borough of Manhattan, City of New York.

Carl Sichel.

Sworn to before me this 22nd day of June, 1950. Richard L. Halpern, Notary Public, State of New York. No. 31-6742750. Qualified in New York County. Certs. filed in N. Y. Co. Clks. & Reg. Off. Commission Expires March 30, 1952.

GENERAL COUNSEL'S EXHIBIT 1-O

"10. (a) Respondent and the Union, by their respective officers, agents, and representatives, did on or about October 25, 1948, enter into a collective bargaining agreement relating to terms and conditions of employment of Respondent's employees in the classifications set forth in paragraph 8 hereof, which agreement required as a condition [fol. 106] of continued employment by Respondent membership in the Union, and which otherwise provided for the preferential treatment of Union members.

"(b) Since on or about October 25, 1948, Respondent and the Union have continued the collective bargaining agreement described in paragraph 10(a) hereof in full force and effect."

GENERAL COUNSEL'S EXHIBIT 4-A

Budget Bureau No. 64-R002.2.
Approval expires July 31, 1950.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

COPY

PETITION

IMPORTANT—READ CAREFULLY

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (*f*), (*g*) and (*h*) of the National Labor Relations Act.

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.	DO NOT WRITE IN THIS SPACE Case No. 2-UA-5448
ATTACHMENTS REQUIRED.—Except when this Petition is filed by an employer under Section 9 (c) (1) (B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.	Date Filed 12/19/49 Compliance Status Checked By:

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

[fol. 107]

1. Purpose of this Petition (*Check only the one box which is appropriate*)

A. [ ] RC—CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.

B. [ ] RM—REPRESENTATION (EMPLOYER).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in Section 9 (a) of the act.

C. [ ] RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in Section 9 (a) of the act.

D. [x] UA—UNION SHOP AUTHORITY.—(*If employer consents to union shop election, use form NLRB-510 instead of this Form NLRB-502.*) Petitioner is the representative of employees as provided in Section 9 (a) of the act and 30 percent or more of employees within a unit appropriate for such purposes desire to authorize Petitioner to make an agreement with their employer requiring membership in Petitioner as a condition of continued employment.

E. [ ] UD—WITHDRAWAL OF UNION SHOP AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8 (a) (3) (ii) of the act desire that such authority be rescinded.

2. Name of Employer
Gaynor News Co.

3. Address(es) of Establishment(s) Involved (Street and number, city, zone, and State)
125 So. 5th Ave. Mt. Vernon, N. Y.

4. Nature of Employer's Business
Newspaper & Magazine Del.

5. Description of Unit Involved
INCLUDED
All routemen, drivers, floormen in delivery department.
EXCLUDED
Supervisory, clerical, professional employees and guards.

6a. Number of Employees in Unit
approximately 40

6b. Number of Employees Supporting this Petition
5

(*If you have checked box 1A (RC) above, check and complete EITHER item 7a or 7b, whichever is applicable*)

[fol. 108]

7a. [ ] Request for recognition as Bargaining Representative was made on ..... and Employer declined recognition on or about
(Month, day, year)
..... (*If no reply received, so state*)
(Month, day, year)

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent (*If there is none, so state*)

NAME	AFFILIATION	ADDRESS	DATE OF RECOGNITION OR CERTIFICATION
Newspaper & Mail Deliverers' Union	None	63 Park Row New York 7, N. Y.	Oct. 25, 1949 (Month, day, year)

9. Date of Expiration of Current Contract, if any
January 24, 1951
(Month, day, year)
(*Fill in Item 10 Only if You Have Checked Box 1E (UD) ABOVE*)

10. Date of Election by Which Union Shop Authority Was Granted
.....
(Month, day, year)

11. Parties or Organizations Which Have Claimed Recognition as Representatives (*If none, so state*)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM
None			

12. Other Unions Interested in the Employees Described in Item 5 Above (*If none, so state*)

NAME	AFFILIATION	ADDRESS
None		

13. Declaration

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Petitioner
Newspaper & Mail Deliverers' Union of N. Y. & Vicinity
Affiliation, if any.....
By
Charles Weinberg — Sec. Treas.
(Signature of representative or person filing petition) — (Title, if any)
Address
Row, New York 7, N. Y. — Rector 2-6135
(Street and number, city, zone, and State) — (Telephone number)

Willfully False Statement on This Petition Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 109] GENERAL COUNSEL'S EXHIBIT 4-B

United States of America

National Labor Relations Board

Withdrawal Request

(Name of case): In the matter of Gaynor News Co.
(Number of case): 2-UA-5448.

This is to request withdrawal of the (petition) [charge]*

(Name of Party Filing): Newspaper and Mail Deliverers' Union of New York and Vicinity.

By (S.) Charles Weinberg, Sec'y-Treas.
Date 12/29/49.

Withdrawal request approved Jan. 4, 1950.* (S.) Charles T. Douds, Regional Director, National Labor Relations Board.

*Struck out in Copy.

[fol. 110] GENERAL COUNSEL'S EXHIBIT 9-A.

Budget Bureau No. 64-R002.2.
Approval expires July 31, 1950.
COPY

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
PETITION

IMPORTANT—READ CAREFULLY

When this Petition is filed by a labor organization or by an individual or group acting in its behalf, the Petition will not be processed unless the labor organization and any national or international of which it is an affiliate or constituent unit have complied with Section 9 (*f*), (*g*) and (*h*) of the National Labor Relations Act.

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering item accordingly.
ATTACHMENTS REQUIRED.—Except when this Petition is filed by an employer under Section 9 (c) (1) (B) of the act, there must be submitted with the Petition proof of interest in the form of dated authorization or membership application cards, or other documentary evidence signed by employees, together with an alphabetical list of their names.

DO NOT WRITE IN THIS SPACE

Case No.
2-UA-4273

Date Filed
8/16/48

Compliance Status Checked by:

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition (*Check only the one box which is appropriate*)
   A. [ ] RC—CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.
   B. [ ] RM—REPRESENTATION (EMPLOYER).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in Section 9 (a) of the act.
   C. [ ] RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in Section 9 (a) of the act.
   D. [x] UA—UNION SHOP AUTHORITY.—(*If employer consents to union shop election, use form NLRB-510 instead of this Form NLRB-502.*) Petitioner is the representative of employees as provided in Section 9 (a) of the act and 30 percent or more

[fol. 111] of employees within a unit appropriate for such purposes desire to authorize Petitioner to make an agreement with their employer requiring membership in Petitioner as a condition of continued employment.

E. [ ] UD—WITHDRAWAL OF UNION SHOP AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to Section 8 (a) (3) (ii) of the act desire that such authority be rescinded.

2. Name of Employer
Gaynor News Co.

3. Address(es) of Establishment(s) Involved (Street and number, city, zone, and State)
125 S. 5th St. Mt. Vernon, N. Y.

4. Nature of Employer's Business
Newspaper & Magazine distributor

5. Description of Unit Involved
INCLUDED
Drivers, routemen and loaders
EXCLUDED
Foremen, clerical, guards and professional employees.

6a. Number of Employees in Unit
55

6b. Number of Employees Supporting this Petition
49

(If you have checked box 1A (RC) above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [ ] Request for recognition as Bargaining Representative was made on ..... and Employer declined recognition on or about
(Month, day, year)
..... (*If no reply received, so state*)
(Month, day, year)

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent (*If there is none, so state*)
NAME
Newspaper and Mail Deliverers Union of New York and Vicinity.

AFFILIATION	ADDRESS	DATE OF RECOGNITION OR CERTIFICATION
		Jan. 1946 (Month, day, year)

9. Date of Expiration of Current Contract, if any
Oct. 16, 1948
(Month, day, year)

[fol. 112]

(Fill in Item 10 Only if You Have Checked Box 1E (UD) ABOVE)

10. Date of Election by Which Union Shop Authority Was Granted

.....
(Month, day, year)

11. Parties or Organizations Which Have Claimed Recognition as Representatives (*If none, so state*)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM

12. Other Unions Interested in the Employees Described in Item 5 Above (*If none, so state*)

NAME	AFFILIATION	ADDRESS

13. Declaration

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Petitioner

Newspaper and Mail Deliverers Union of New York and Vicinity.

Affiliation, if any.....

By

/s/ Samuel Duker — Attorney

(Signature of representative or person filing petition) — (Title, if any)

Address

63 Park Row, N. Y. 7, N. Y. — Re 2–9370

(Street and number, city, zone, and State) — (Telephone number)

Willfully False Statement on This Petition Can be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80)

[fol. 113] GENERAL COUNSEL'S EXHIBIT 9-B

(Copy)

United States of America

National Labor Relations Board

Withdrawal Request

(Number of case): 2-UA-4273.

(Name of case): In the matter of Gaynor News Co.

This is to request withdrawal of the (petition) [charge]* in the above case without prejudice.

(Name of Party Filing): Newspaper and Mail Deliverers Union of New York and Vicinity.

By (S.) Samuel Duker, Attorney.

Date 9/10/48.

Withdrawal request approved, 8/13/48.

(S.) Charles T. Douds, Regional Director, National Labor Relations Board.

G-51.

[fol. 114] GENERAL COUNSEL'S EXHIBIT 2

Agreement made this 25th day of October, 1948, by and between Gaynor News Company, Inc., hereinafter called the "Employer" and Newspaper and Mail Deliverers' Union of New York and Vicinity, hereinafter called the "Union", for and in behalf of the Union.

Witnesseth:

That in consideration of the mutual promises exchange herein, the parties hereto agree as follows:

Section 1

Subject to the provisions hereinafter set forth, the Employer recognizes the Union as the exclusive representative

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* Struck out in copy.

for collective bargaining for all of its employees who perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed by the following: chauffeurs, distributors, route men, tiers, floor men, wrapper writers, relay men and Canada men; present practice may be continued by the Employer as to operations in and jurisdiction over the return room. Employees may be required by the Employer either on different days or on any one day to perform any one or more of the operations covered in this paragraph, but no employee who is or has been performing satisfactorily the operation or operations assigned to him shall be discharged because of his inability to perform some other operation, and no employee shall be refused employment for the performance of any operation or combination of operations as to which there is a vacancy and for the doing of which he is qualified solely because he is not qualified to perform some other operation.

[fol. 115] Section 2

2-a. The Union offers to furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the Employer requires its regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift.

2-b. The Employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees employed after the effective date of this agreement as a regular situation holder be required to become members of the Union thirty days following the beginning of employment.

2-c. The parties hereto agree that when a definition or interpretation of the thirty-day period has been handed down by law, then such definition or interpretation shall thereafter govern insofar as this contract is concerned.

• • • • • • •

Section 17

Mutual Guarantees

Because of the enactment of the Labor-Management Relations Act, 1947, this contract differs from its immediate predecessor and from contracts between these parties over a period of many years. Specifically, this agreement eliminates closed shop, and references thereto because it no longer is permissible under the federal law. This provision [fol. 116] is appended hereto as an appendix to, but not as a part of, this contract.

It is understood and agreed, however, for the duration of this contract, that if any provision as shown in the appendix hereto, and as modified from the preceding contract or excluded from this contract solely because of the restrictions of law, no longer is held to be inoperative, either by legislative enactment or by decision of the court of highest recourse, then such provision automatically shall become a part of this contract, to the extent permitted, and be in force and effect as though it had been originally made a part hereof.

To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect.

It is mutually agreed that the spirit as well as the letter of this agreement is to be observed in full and that neither party will enter into any other agreement which in any way renders impossible or inoperative any provision of this contract.

* * * * * * *

[fol. 117] Schedule A

Gaynor News Company

	Daily	*Hourly Overtime*
Day Rates	$16.19	$3.0355
Night Rates	16.41	3.0768

Employees engaged in the performance of any of the operations set forth in Section 1 hereof receiving a wage above the present scale of wages at the signing of the Sept. 1943 contract, shall, so long as they continue employed at such operation by the employer, receive the increase provided for in this agreement, in addition to the wages they now receive; such excess compensation shall not be deemed to be attached to the several positions held by such employees but shall be deemed personal to them.

Any agreement which the Employer made at any time subsequent to September 9, 1943, for compensating any one or more employees engaged in the performance of any of the operations covered in Section 1 hereof at a rate in excess of the regular rate fixed herein, shall be subject at all times to the control of the Employer and may at any time, be modified or abrogated in whole or in part by the Employer.

[fol. 118] Schedule B

More than 15 days	but less than 25 days	1 day's vacation
More than 24 days	but less than 41 days	2 day's vacation
More than 40 days	but less than 57 days	3 day's vacation
More than 56 days	but less than 73 days	4 day's vacation
More than 72 days	but less than 89 days	5 day's vacation
More than 88 days	but less than 105 days	6 day's vacation
More than 104 days	but less than 121 days	7 day's vacation
More than 120 days	but less than 137 days	8 day's vacation
More than 136 days	but less than 153 days	9 day's vacation
More than 152 days	but less than 169 days	10 day's vacation
More than 168 days	but less than 185 days	11 day's vacation
More than 184 days	but less than 201 days	12 day's vacation
More than 200 days	but less than 217 days	13 day's vacation
More than 216 days	but less than 233 days	14 day's vacation
More than 232 days		15 day's vacation

RESPONDENT'S EXHIBIT 2

Supplementary Agreement

The Gaynor News Company, Inc. and the Newspaper and Mail Deliverers' Union of New York and Vicinity herewith extend for the period of one year to and including October 18, 1948 the contract existing between them with only such changes as are hereinafter specified.

1. That beginning with the day shift of June 26, 1946, the wage rates shown in paragraph 7 shall be increased by $1.00 per shift.

2. Paragraph 19 shall be amended to incorporate the following as 19(c):

[fol. 119] "19 (c) If either party desires to negotiate for a revision of the basic wage rates as shown in paragraph 7, herein amended, the parties shall enter into such negotiations thirty days prior to October 16, 1947 upon written notice by either party to the other.

"If such negotiations do not produce a mutually satisfactory agreement by September 30, 1947, then the matter shall be submitted to arbitration before a 5-Man Board consisting of two representatives of the Union, two representatives of the Employer and a fifth man, who shall be Chairman of the Arbitration Board and who shall be selected.

(1) by mutual agreement of the parties within 24 hours following September 30, 1947, or failing such an agreement,

(2) who shall be appointed by the Director of the United States Conciliation Service upon application by either or both parties on October 2, 1947.

Request shall be made of the Board of Arbitration that the matter be heard and determined before midnight on Oct. 16, 1917, so that any revision of the wage scale may become effective with the day shift of October 17, 1947. A decision of a majority of the Board shall be final and binding on all parties.

"It is mutually understood that if the parties agree among themselves, prior to October 17, 1947, on any

[fol. 120] revision of the wage scale then that such revision shall go into effect for the contract year beginning with the day shift of October 17, 1947, and ending October 16, 1948.

3. The parties hereto shall immediately after the signing and executing of this supplementary agreement undertake a study of the provisions of paragraph 14 (b) and 14 (f) of the contract to the end that:

(a) the filling of a vacancy brought about by a regular situation becoming vacant or a new regular situation being created shall affect no more than two members of the Union and shall not create a general round of applications for a series of vacancies brought about by an original vacancy; and

(b) that there be an equitable modification of the present provision of paragraph 14 (f) which permits an employee to retain a regular situation by working on it only one day in any 31 day period.

Should the parties fail to agree upon the modification of paragraph 14 (b) and 14 (f) as indicated herein within the period of ninety days after this agreement shall have been signed, then this matter shall be referred within ten days thereafter to a Board of Arbitration consisting of two representatives of the Employer, two representatives of the Union and the Impartial Chairman serving under paragraph 18 of the contract herein amended, who shall serve as Chairman of the Board.

A decision of the majority of this Board of the provisions of paragraph 14 (b) and 14 (f) shall be final and binding on [fol. 121] both parties and such decision shall be incorporated in the contract between the parties.

Signed this 22nd day of August 1946.

Gaynor News Company, Inc., By James B. Gaynor—President. Newspaper & Mail Deliverers' Union of New York and Vicinity, Joseph Simons, President, William J. Burke, Secty. & Treas.

RESPONDENT'S EXHIBIT 1

9:15. Received Jun. 6, 1949, Second Region, New York, N. Y., NLRB.

Memorandum of agreement made this 2nd day of January 1946 by and between Gaynor News Company, Inc., hereinafter referred to as the "Employer" and Newspaper and Mail Deliverers' Union of New York and Vicinity, hereinafter referred to as the "Union", for and in behalf of the Union and for and in behalf of the members thereof now employed and hereafter to be employed by the Employer and collectively designated as the "Employee",

[fol. 122] In consideration of the sum of ($1.00) dollar each to the other in hand paid, receipt of which is hereby mutually acknowledged, and in consideration of the mutual promises and covenants hereinafter set forth, the said parties hereto agree to and with each other as follows:

1. The Employer hereby agrees to employ only members of the Union to do and to perform all work in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise in the operations performed by the following: chauffeurs, distributors, routemen, tiers, floor men, wrapper writers, relay men, and Canada men; present practice may be continued by the Employer as to operations in and jurisdiction over the return room. Members of the Union may be required by the Employer either on different days or on any one day to perform any one or more of the operations covered in this paragraph but no member of the Union who is or has been performing satisfactorily the operation or operations assigned to him shall be discharged because of his inability to perform some other operation; and no member of the Union shall be refused employment for the performance of any operation or combination of operations as to which there is a vacancy and for the doing of which he is qualified solely because he is not qualified to perform some other operation.

2. The Union shall furnish at all times and at regular time rates as many men as may be required by the Employer, such men to be competent and able to perform the particular operation for which they are required. If the

Employer requires his regular employees to work in excess of a fifth shift, overtime at the rate of time and one-half shall be paid for the full shift. When the Union fails to [fol. 123] furnish such men promptly, the Employer is authorized to meet his needs by employing such men as he may be able to obtain; if the men so employed are not members of the Union they shall be employed only so long as the Union does not furnish members of the Union willing and qualified to take their places, but any man so employed shall be allowed to complete his day's work. Nothing herein contained is to be construed as conferring of power upon any Employer to fill a regular situation with anyone not a member of the Union.

* * * * * * *

7. Wage rates for the performance of the several operations set forth in paragraph "1" hereof shall be as herein provided, retrospectively to and from July 1, 1945.

	Daily	*Overtime*
Day rates	$10.46	$1.96 per hr.
Night rates	11.13	2.086 per hr.

8. (a) All overtime shall be compensated at a rate of one and a half times the regular hourly rate and shall be computed in fifteen minute periods.

(b) Overtime before and after a day or night shift shall be worked as required by the Employer. Any charge that overtime is being required or distributed unfairly may be taken to the Adjustment Board for settlement.

(c) An Employee required to finish his job at a point sufficiently far from where it began to involve substantial travel time shall be compensated therefor. The parties shall negotiate such an arrangement and if they are unable to agree within thirty days after the effective date of this agreement the matter shall be submitted to the Adjustment Board.

[fol. 124] (d) Employees who, during the preceding calendar year, worked more than 52 days but less than 78 days, shall receive 2 days' vacation.

Employees who, during the preceding calendar year, worked more than 129 days but less than 182 days shall receive 6 days' vacation.

Employees who, during the preceding calendar year worked, more than 181 days but less than 234 days, shall receive 8 days' vacation.

Employees who, during the preceding calendar year worked more than 233 days shall receive two weeks' vacation.

Such vacation credit shall be earned when an employee is working on a situation as a regular or extra or substitute employee. The spirit and purpose of this provision is to disallow the duplication of vacation credits on the same situation. Days during sick leave shall be included in the schedule of days worked for which vacations are allowed. Holidays shall be included in the days for which vacations are allowed. The vacation schedule shall be arranged at the convenience of the employer, but on the basis of seniority. The days of the vacation period shall be consecutive. The Union shall supply union men to the Employers to cover the periods for which vacations are allowed, who may be employed at straight time rates. Employees thus receiving vacations will not be allowed to work during the vacation period. An employee who works during vacation period shall not be entitled to vacation pay. * * *

* * * * * * *

[fol. 125] 19. (a) This agreement shall be deemed effective from October 1, 1945 on receipt by the Employer of written notice from the Union that the agreement has been approved by the Executive Council and the members of the Union and shall continue in effect until and including October 16, 1947. The wages fixed in any renewal of this agreement shall be retroactive for the period from July 17, 1947 to October 16, 1947.

(b) On July 17, 1947 the parties to this contract shall in good faith begin to negotiate a contract for the period beginning October 17, 1947, and shall continue such negotiations until August 17, 1947. Such points as remain unsettled on August 17, 1947, shall come before a mediator to be designated by the New York State Board of Mediation and the parties shall continue to negotiate with the assistance of such mediator until September 17, 1947. Such points as remain unsettled on September 17, 1947, shall come before a Conciliator to be appointed by the Director

of the United States Conciliation Service and the parties shall work with such Conciliator until the matter is settled, but this provision shall not require either party to continue negotiations before such Conciliator beyond October 16, 1947, the expiration date. The parties may by mutual consent call upon the New York State Board of Mediation and the United States Conciliation Service jointly on August 17, 1947, or any time thereafter instead of proceeding separately with the two services as described in the foregoing sentences. The parties may by mutual consent discontinue negotiations before the New York State Board of Mediation prior to September 16, 1947, and call in the United States Conciliation Service at that time instead of [fol. 126] waiting until September 17, 1947. The parties may by mutual consent continue with the Mediator appointed by the New York State Board of Mediation after September 16, 1947, instead of calling in the United States Conciliation Service on September 17, 1947.

20. The signing of this agreement with the wage rates herein specified shall not be construed as establishing a pattern for wage differentials.

21. It is understood and agreed that the Union representatives are signing this agreement subject to the approval of the Executive Council and the members of the Union.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

Gaynor News Company, Inc., James B. Gaynor, President; Newspaper & Mail Deliverers' Union of New York & Vicinity, Joseph Simons, President; Daniel Ronan, William J. Burke, Charles J. Pellegrino.

[fol. 127] BEFORE THE NATIONAL LABOR RELATIONS BOARD, SECOND REGION

[Title omitted]

STIPULATION--November 29, 1950

It is hereby stipulated and agreed by and among Bandler, Haas & Kass, Counsel for Respondent, and Samuel Duker, Counsel for the Party to the Contract, and Merton C. Bernstein and Jerome A. Reiner, Counsel for the General Counsel of the National Labor Relations Board, as follows:

1. Annexed and attached hereto and made a part hereof as if herein set forth in full is a copy of the supplementary agreement entered into by and between Gaynor News Company, Inc. and Newspaper & Mail Deliverers' Union of New York & Vicinity on the 9th day of October, 1947, amending the 1946 collective bargaining agreement, then in effect [fol. 128] between Gaynor News Company, Inc. and Newspaper & Mail Deliverers' Union of New York & Vicinity.

2. That the said supplementary agreement, Respondent's Exhibit A, be and is hereby made a part of the Record in the proceedings in the above entitled matter.

Dated: New York, November 29, 1950.

(S.) Merton C. Bernstein, Jerome A. Reiner, Counsel for the General Counsel, National Labor Relations Board, Second Region.

(S.) Bandler, Haas & Kass, Attorneys for Gaynor News Company, Inc. (S.) Samuel Duker, Attorney for Newspaper & Mail Deliverers' Union of New York and Vicinity.

SUPPLEMENTARY AGREEMENT—October 9, 1947

The contract between Gaynor News Company, Inc. and the Newspaper and Mail Deliverers' Union of New York and Vicinity, dated January 2, 1946, as supplemented by a

supplementary agreement between the parties dated August 22nd, 1946, is hereby further supplemented as follows:

1—Effective with the day shift of October 17th, 1947, and ending October 16th, 1948, the wage rates shown in paragraph 7 shall be increased by $2.15 per shift.

[fols. 129-130] 2—Paragraph 19 (b) is hereby amended to read "1948" wherever therein the year "1947" appears.

3—In the event that the parties enter into a new written contract effective from the expiration of the existing contract which new contract shall expire no earlier than three months after the effective term of any new written contract which the Union may enter into with the Publishers' Association of New York City, then and in such event, the wage rates provided in such new contract between the parties hereto shall be applicable retroactively for the last three months of the present existing contract between the parties hereto in lieu and instead of the wage rates provided in the present existing contract between the parties hereto for the said three months period.

This agreement has been duly ratified by the Union Executive Council and by the Union General Body.

Dated, New York, October 9th, 1947.

Gaynor News Company, Inc. by (S.) James B. Gaynor, Pres. Newspaper and Mail Deliverers' Union of New York and Vicinity, by (S.) Joseph E. Curtis, Pres., Daniel F. Roman, William J. Burke, Charles J. Pellegrino, Leon Braunstein.

[fol. 131] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Appendix to Brief for Respondent

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER BY THE NATIONAL LABOR RELATIONS BOARD—February 25, 1952

To the Honorable, the Justices of the United States Court of Appeals for the Second Circuit:

Gaynor News Company, Inc., respectfully answers the petition for enforcement submitted in the above matter by the National Labor Relations Board on the 20th day of February, 1952.

The respondent respectfully admits all of the allegations of the petition except that it denies that it committed any unfair labor practice as stated in the petition, Paragraph "1", and in the order recited under Paragraph "2", and, therefore, states that this Court must deny enforcement of said order and further respectfully shows:

1. That the National Labor Relations Board was at all times relevant to the proceedings hereto and still is without jurisdiction to have issued the complaint by virtue of the fact that alleged violation did not occur in order to encourage membership in the union, and was, therefore, not activity in violation of the Act.

[fol. 132] Wherefore, the respondent prays this Honorable Court that they cause notice of the filing of this answer and a copy thereof to be served upon the petitioner and that it deny enforcement of the order set forth in Paragraph "2" of the petition in its entirety and for such other and further relief as to the Court may seem just and equitable in the premises.

Dated: New York, N. Y., February 25, 1952.

Gaynor News Company, Inc., by Bandler, Haas & Kass; Julius Kass, a Partner, Bandler, Haas & Kass, Attorneys for Respondent.

[fol. 133] BEFORE NATIONAL LABOR RELATIONS BOARD

EXCERPTS FROM TESTIMONY

JAMES B. GAYNOR resumed the stand and testified further as follows:

Direct examination (Continued)

• • • • • • •

Mr. Kass: The stipulation is very simple, that any contract that existed between the union—and now we are getting into the issue in this case, Mr. Examiner, for the first time after a day and a half—that any contract between Gaynor News Company and Newspaper and Mail Deliverers' Union, was a contract whose benefits applied exclusively to members of the union; that by virtue of our obligations under the contract we made payment to the union members as required by that contract; that we made no payment to Sheldon Loner of vacation benefits which were paid to union members.

• • • • • • •

Mr. Kass: Mr. Examiner, so that we can save time, to explain the situation, the contract prior to General Counsel's Exhibit 2 provided for two weeks vacation. By virtue of the contract identified as General Counsel's Exhibit 2 a three-week vacation was provided for. Because of the fact that it had been established as general practice in other branches of the industry, and despite the fact that under the contract we were not obligated to give our employees a third week of retroactive vacation, in the interests of good labor relations and to maintain peace with the union, and not to have a different standard apply throughout the industry, we voluntarily granted those of our employees who were with us a third week's vacation.

• • • • • • •

[fol. 134] LEON BRAUNSTEIN was called as a witness by and on behalf of the Respondent, and having first been duly sworn, was examined and testified as follows:

Direct examination.

• • • • • • •

Q. In your capacity of business agent of the union, did you know Sheldon Loner?

A. Yes.

Q. Can you tell us whether Mr. Loner at any time attempted to become a member of the Newspaper and Mail Deliverers' Union?

Mr. Bernstein: Objection. I fail to see the relevancy. The question as put is indefinite as to time and place. Unless put in some setting, it certainly has no relevancy. However, if at any time Mr. Loner made application for the union it would have no significance whatsoever.

Trial Examiner Asher: What is the materiality?

Mr. Kass: The materiality of the thing is that we will attempt to prove that we could not encourage Mr. Loner to become a member of this union because he had made every effort on his own behalf to become a member of this union.

• • • • • • •

Trial Examiner Asher: Let me ask Mr. Kass some questions. Assuming for the purpose of argument that Mr. Loner had attempted to become a member of the union, and had been unsuccessful in doing so, what is your theory as to how that would affect the question of whether or not the respondent is guilty of unfair labor practices?

Mr. Kass: I can state that very simply. I know as a matter of fact that Mr. Loner had for some time, and has for some time attempted to become a member of this union. I know that he has been unsuccessful in becoming a member [fol. 135] of this union because of the restrictions of the union upon its membership. I therefore contend on behalf of Gaynor News Company that because of his overwhelming, his burning, his intense desire to become a member of this union that there was nothing we could do that would encour-

age him to membership because he was already trying to become a member of that union. And that is our case.

* * * * * * *

Trial Examiner Asher: You have an automatic exception. If you care to, you can make an offer of proof on the record.

Mr. Kass: Through the witness, Leon Braunstein, we hereby offer to prove that Mr. Loner, the complaining witness in this case, attempted to be a member of this union. He filed his application for membership, that is his application for membership is still pending in the union and that the application for membership was filed long before October 25, 1948.

* * * * * * *

Sheldon Loner was called as a witness by and on behalf of the Respondent, and having first been duly sworn, was examined and testified as follows:

* * * * * * *

Direct examination:

* * * * * * *

Q. Did you ever file an application for membership in the Newspaper and Mail Deliverers' Union of New York and Vicinity?

Mr. Bernstein: Objection on the same ground as the question put to Mr. Braunstein.

[fol. 136] Trial Examiner Asher: Is the purpose of this question the same?

Mr. Kass: The purpose of this question is to develop testimony on the question of whether we encouraged Mr. Sheldon A. Loner to become a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity and also to test the credibility with reference to the charges filed against the Gaynor News Company.

Mr. Bernstein: As to the issue of encouragement, I have already made my statement on the record. As to the issue of the witness' credibility, he has as yet not testified to any

material matter and his credibility is not at this point, at any rate, in issue.

Mr. Kass: He is a hostile witness, sir, and I draw your attention to the fact that this case was initiated by charges filed by this witness.

Trial Examiner Asher: That's correct, and under Rule 4B, you have the right, if you request it, to consider him a hostile witness.

Mr. Kass: I so request it.

* * * * * * *

Mr. Kass: The counsel for the General Counsel came in here and asked as part of his case that you take judicial notice of other petitions and a lot of other records around this Region of the National Labor Relations Board and I am trying to find out the history of the preparation of these charges. I am trying to find out why the charges weren't brought against the union at the same time they were brought against us. I question the bona fides of these charges. I question the good intentions of the Board in the preparation of the charges. I am trying to probe into them.

* * * * * * *

[fol. 137] Q. Did you make a demand upon Gaynor News Company for payment of retroactive pay?

* * * * * * *

A. Well, it seems natural that I did make a demand. I asked them for it—not exactly.

Q. Who did you ask for the money?

A. The party?

Q. Yes.

A. I spoke to Mr. Murray Levine.

* * * * * * *

Q. Who is Mr. Murray Levine?

A. He is the foreman.

Q. When did you speak to him?

A. I'd say it was within a couple of days after the retroactive pay was given.

Q. Well, what date was that?

A. Sometime in the middle of November, 1948.

Q. So that sometime in the middle of November, a few days after the retroactive pay was paid you asked Murray Levine for your money; is that correct?

A. No.

Q. What did you do?

A. I asked Murray Levine, "Do I get retroactive pay?"

Q. What did he say to you?

A. He said I was not entitled to it since I wasn't a member of the union.

Q. You weren't a member of the union, were you?

A. No.

Q. Had you applied for membership in the union?

Mr. Bernstein: Objection.

Mr. Kass: The witness opened the door himself. He said he was not a member of the union.

Mr. Bernstein: That has nothing to do with whether he applied or not. One fact appears on the record and is an operative fact.

Trial Examiner Asher: I will rule that whether or not he applied for membership in the union is immaterial. The objection is sustained.

Q. You knew that Gaynor was under contract with the Newspaper Deliverers' Union; is that correct?

[fol. 138] Mr. Bernstein: Objection. What the witness knew as to the contract is irrelevant to this proceeding.

Trial Examiner Asher: Oh, I will allow it in.

Mr. Bernstein: On what ground?

Trial Examiner Asher: Background.

Mr. Kass: Don't you think it is also pertinent as an essential fact in the case in addition to background?

Trial Examiner Asher: I will let it in for whatever it is worth. When I write my intermediate report I will place such weight on it as I believe should be placed on it.

Mr. Kass: That is better.

Would you repeat the question, Mr. Reporter?

(Question read.)

A. Yes.

Q. And you knew that that contract provided for employment of members of the union only, is that correct?

Mr. Bernstein: Objection. The contract speaks for itself. It is the best evidence of what is required.

Trial Examiner Asher: I think the question was his understanding of what the contract provided.

* * * * * * *

Q. Is your father a member of the Newspaper Mail Deliverers' Union?

Mr. Bernstein: Objection.

Trial Examiner Asher: What is the materiality of that?

Mr. Kass: The materiality is on the question of encouragement.

Trial Examiner Asher: I will sustain the objection.

* * * * * * *

[fol. 139] A. I knew there was a contract. Just what do you mean by "employer relationship"?

Q. Did you know that there was a contract between the union and Gaynor News Company which covered wages, hours, working conditions?

A. I was aware.

Q. You were aware. You had gotten your job at the Gaynor News Company through the business agent of the union, had you not?

Mr. Bernstein: Objection. How he got his job is immaterial at this point.

Trial Examiner Asher: What is the materiality?

Mr. Kass: The materiality is to show the question of encouragement of membership in the union.

* * * * * * *

Q. How did you get your job with the Gaynor News Company?

Mr. Bernstein: Objection. How he got his job with the company has no relevancy to the issues here.

Trial Examiner Asher: Same ruling.

Q. Did you ask Mr. Braunstein to get you a job with the Gaynor News Company——

* * * * * * *

JAMES B. GAYNOR recalled on behalf of the Respondent:

Trial Examiner Asher: I will remind you, Mr. Gaynor, you are still under oath.

Direct examination.

By Mr. Kass:

Q. I show you a copy of contract dated 2nd day of January, 1946 between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity and [fol. 140] ask whether this is a true copy of the collective bargaining agreement negotiated between your company and the union?

A. This is a true copy.

* * * * * * *

Q. Mr. Gaynor, I show you supplementary agreement between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity, dated October 18, 1948, and ask whether that is a true copy of the agreement executed by Gaynor News Company and the union?

Trial Examiner Asher: Suppose we mark that Respondent's Exhibit 2 for identification?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 for identification.)

A. It is.

* * * * * * *

Q. Do you have personal knowledge, Mr. Gaynor, as to the payments made to your employees by virtue of contracts?

A. I do.

Mr. Bernstein: May I ask that the Trial Examiner direct the witness to give Counsel for General Counsel the opportunity to make his objections heard? The witness is answering so quickly that I haven't got the opportunity.

The Witness: If you are slow, what do you want me to do?

Trial Examiner Asher: Just a minute. Let us not have any argument here. Give counsel a reasonable chance.

However, if that does happen no great harm is done because you can always move to strike the answer.

Proceed.

[fol. 141] Q. I am making reference to retroactive wage payments made to union employees for the period covering July 17, 1948 to October 24, 1948. Were those payments made to the members of the union in your employ at your direction?

A. They were.

* * * * * * *

Q. Were the orders for the non-payment of retroactive pay to non-union members issued at your direction?

A. They were.

Q. Can you tell us why you made payment of retroactive pay to the union members?

* * * * * * *

A. Yes, because it was called for by contract.

Mr. Bernstein: I move to strike as giving a legal conclusion.

Trial Examiner Asher: Do you wish to reply to that?

Mr. Kass: No, go ahead, you rule on it. I have asked a question.

Mr. Bernstein: What was or was not required by any of the contracts that are in evidence is attested to by those contracts.

Trial Examiner Asher: I will deny the motion to strike but I want to ask the witness a question to clarify that. When you say it was called for by the contract, to what contract are you referring?

The Witness: The contract is here dated with a supplemental agreement, original contract dated 2nd day of January 1946 and the supplemental.

* * * * * * *

Q. Mr. Gaynor, were you the official of the Gaynor News Company who issued the orders that after the effective date of the present contract, the one dated October 24, 1948 and identified in the proceedings as General Counsel Exhibit

No. 2, are you the official of the company who issued orders [fol. 142] not to give increased vacation benefits to non-union employees?

A. Would you read that question back?

(Question read.)

A. Yes, I am.

Q. Why did you issue the order that non-union employees were not to receive the increased vacation benefits?

A. Because I felt——

Mr. Bernstein: May I have a standing line of objections to these questions which call for the operation of the witness' mind?

Trial Examiner Asher: The record will so indicate.

A. (Continuing:) Because I felt I was bound only *my* contract to pay the union men those increased benefits.

* * * * * * *

Q. Mr. Gaynor, would you give me the history of the collective bargaining relationship between Gaynor News Company and Newspaper and Mail Deliverers' Union of New York and Vicinity?

Trial Examiner Asher: From how far back?

Q. From its inception.

Mr. Bernstein: It seems rather broad, Mr. Examiner.

Trial Examiner Asher: May I ask the witness first when the inception was?

The Witness: The inception was in 1943.

Trial Examiner Asher: There was another question also pending.

Q. Will you answer my question, please? Give us the history of the collective bargaining relationship.

A. Well, at the beginning the drivers, or rather the em- [fol. 143] ployees that I then had were taken into the union and were given union cards before any collective bargaining agreement was arrived at with the Gaynor News Company. In May of that year, if my memory serves me right,

the drivers staged a sit-down strike in order to force the union to negotiate a contract with me. That time——

Mr. Bernstein: Excuse me, will the Reporter read that back, please?

Mr. Kass: I think the witness ought to be permitted to testify without interruption.

• • • • • • •

A. (Continuing:) —at the time I believe the War Labor Board was in existence and I believe it was through their offices that the men went back to work. After a long and tedious negotiation, the first contract was arrived at and, may I add, with a great many hardships.

The next contract—I believe that was a two-year contract.

Mr. Bernstein: Which date was that?

The Witness: I believe that would have been effected in October of 1943, approximately that date, I am not quite sure of the date. The next contract was negotiated two years later. At that time there was a joint negotiation, all the members in the Suburban Area negotiated together with this union for the purpose of saving time in negotiations. That was also a long and tedious negotiations and ran——

Trial Examiner Asher: What are we up to now, 1945?

The Witness: '45, yes. If I am not mistaken, it ran beyond the expiration date of the contract, the negotiation itself.

Q. And that resulted in the agreement identified as Respondent's Exhibit No. 1, is that correct, January 2, 1946?

A. That is correct.

• • • • • • •

[fol. 144] JAMES B. GAYNOR resumed the stand, and further testified as follows:

By Mr. Kass:

Q. Mr. Gaynor, when you were testifying yesterday, you were giving us the history of the collective bargaining

relationship between Gaynor News Company and the Newspaper and Mail Deliverers Union, and you had reached the point in your relationship where you had made reference to the negotiations which resulted in the contract of January 2, 1946. Would you please continue from that point?

A. Well, as I have previously stated, the negotiations were long and tedious, and during the negotiations we were harassed by threats of work stoppage, and it took a great deal of time, long hours, meetings into the night, to conclude that agreement. It was anything but a harmonious negotiation, both sides trying to get the best of the deal, and we were presented with a great many impossible demands. And we finally arrived at a contract.

Q. And the contract that you now refer to is the contract dated October 24, 1948, is that correct?

A. That is correct.

Q. You are charged with a violation by the General Counsel of Section 8 (a) (1) of the Act, and that section reads as follows:

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7;"

I want to read Section 7 of the Act to you, and then direct a question to you with reference to it, and I would appreciate if you would pay close attention while I read Section 7 to you.

It reads:

"Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collec- [fol. 145] tively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

Now, I ask you, did you at any time interfere with the right of any of your employees to "form, join or assist

labor organizations, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"?

Mr. Bernstein: Objection. I object to the form of the question. It is leading. I object to the question on the ground that it calls for a conclusion of law. I further object on the ground that it calls for the operation of the witness' mind.

I further object to the question on the ground that it calls for testimony which is immaterial and irrelevant to the charges and issues in this case.

Trial Examiner Asher: Let me ask the witness: Do you understand what the words mean which were read to you by your counsel?

The Witness: Yes, I believe I do.

Trial Examiner Asher: I will overrule the objection, and allow the witness to answer.

By Mr. Kass:

Q. Will you answer yes or no to the question, sir?

A. I did not in any way interfere.

Q. You are also charged with a violation of Section 8 (a) 2, and that section reads as follows:

"It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration [fol. 146] of any labor organization or contribute any financial or other support to it."

I ask you, did you, at any time, dominate or interfere with the formation or administration of the Newspaper and Mail Deliverers Union of New York and Vicinity?

Mr. Bernstein: Same objection, Mr. Examiner. I wish to point out that these questions are highly leading, and in addition to that, I wish to emphasize that they call for conclusions of law.

Trial Examiner Asher: I don't consider them so highly leading.

Let me ask the witness again: Do you understand the meaning of the words read to you by your counsel?

The Witness: Yes, I do.

Trial Examiner Asher: I will overrule the objection and allow the witness to answer.

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A. I did not.

By Mr. Kass:

Q. You are also charged by the General Counsel with a violation of Section 8 (a) 3, and that section of the Statute says that:

"It shall be an unfair labor practice for an employer, by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization."

Now, I ask you whether you did, at any time, by discrimination in regard to hire or tenure of employment or any term or condition of employment encourage or discourage membership in the Newspaper and Mail Deliverers Union of New York and Vicinity?

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[fol. 147] Q. Will you tell us whether you, at any time, by discrimination in regard to hire or tenure of employment or any term or condition of employment did encourage or discourage membership in the Newspaper and Mail Deliverers Union of New York and Vicinity?

A. I did absolutely nothing to encourage or discourage membership in this union.

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Cross-examination.

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Q. And were there non-union employees from that time to the present always employed in the delivery department of Gaynor?

A. I believe that is correct.

Q. On January 1, 1946, Mr. Gaynor, were you aware of

the fact that the union had a policy of limiting its membership?

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Mr. Bernstein: The relevancy of the question, Mr. Examiner, is as follows: You will note that the preamble to Respondent's Exhibit No. 1 indicates that the union is recognized for and on behalf of its members. Later on, it purports to be a closed shop contract.

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Trial Examiner Asher: You are referring to Respondent's Exhibit 1?

Mr. Bernstein: I believe so, if that is the January 1946 contract. You will notice in the first sentence what the recognition clause is.

I wish to point out and I wish to prove through this witness that at all times the respondent knew and had reason to know that non-union employees would be continually in the employ of its delivery department. I wish to show what the practice was and what the expectations of the respondent were.

[fol. 148] Mr. Kass: Mr. Examiner, may I invite your attention to the fact that there are no allegations in the complaint challenging the validity of the contract dated July 2, 1946? This complaint questions the legality of the current contract, the one executed October 25, 1948. There are no allegations whatsoever with reference to the old contract.

We attempted to show you yesterday, and there was strenuous objection by counsel for the General Counsel to the open and honest admission of testimony when the complaining witness, Sheldon Loner, was on the stand, and I hope that you recall that I asked him whether he was a member of the union, whether he had tried to become a member of the union, and I wanted to introduce testimony which brought into the open the entire question of what this complaining witness wanted to do with reference to the union.

Counsel for General Counsel, for reasons best known to himself, wanted to hide the full facts from the examiner,

and evidently from the courts. What could be gained by that concealment is beyond my comprehension. But, anyway, he made the concealment, and he wanted to hide the facts.

We wanted to tell you yesterday that by virtue of that agreement of January 2, 1946, we had a contract where we were bound to employ exclusively members of the union, and we wanted to tell you that by virtue of that contract, when Sheldon Loner took a job there, when he got that job through the aid and assistance of the business agent of the union, Leon Bronstein, who, again, the counsel for the General Counsel did not permit to testify, to give you the entire facts—this boy knew that he could be bumped out of his job when a union man applied for the job. That was the con-[fol. 149] tract and that was the law, under the old Wagner Act. The Colgate-Palmolive-Peet case, which I cited to you yesterday, decided by the United States Supreme Court on December 5, 1949, in a strong opinion by Judge Minton, upheld the validity of that contract and ruled that the policy of the Board, where they attempted to attack that type of contract and discharges under that type of contract, was censorable.

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By Mr. Bernstein:

Q. But you knew, in fact, Mr. Gaynor, didn't you, that on January 1, 1946, it was almost impossible to gain admission to this union unless you were the son of a member of that union? Weren't you aware of that fact at that time?

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SHELDON LONER, recalled.

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By Mr. Kass:

Q. Mr. Loner, did you obtain your job with the Gaynor News Company through Leon Bronstein, business agent of the Newspaper and Mail Deliverers Union of New York and Vicinity?

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By Mr. Kass:

Q. Mr. Loner, did you at any time prior to your employment with Gaynor News file an application for membership in the Newspaper and Mail Deliverers Union?

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[fol. 150] Mr. Kass: Yes, sir. Section 12 of the complaint charges us with encouraging membership in the union, and I desire to prove, through -his witness, of his own volition, this witness had applied for membership in the union; that his job with Gaynor News Company was obtained through union intercession, and that he, at the present time, has an application for membership in the Newspaper and Mail Deliverers Union, and therefore it supports our defense that we could not encourge this charging witness with membership in the union, since he was doing everything humanly possible under the sun, within his power, to become a member of that union.

Trial Examiner Asher: Do you consider that as an offer of proof?

Mr. Kass: Yes, sir.

Trial Examiner Asher: The offer of proof is rejected, and the objection is sustained.

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By Mr. Kass:

Q. Were you encouraged to become a member of the Newspaper and Mail Deliverers Union of New York and Vicinity as a result of your not receiving retroactive pay and vacation pay?

Mr. Bernstein: Objection. The actual effect of the company's action upon the charging party, or others, is not material.

Trial Examiner Asher: Do you want to reply to that before I rule?

Mr. Kass: Yes, sir. That is the charge, the charge made against us in accordance with the statute, "thereby encouraging membership in the union."

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[fols. 151-152] Trial Examiner Asher: I believe that was my ruling the first day of the hearing, Mr. Kass, as to the intervention and certain limitations.

I will rule on this question that whether or not Mr. Loner actually felt that effect is immaterial, and the objection is sustained.

By Mr. Kass:

Q. Was there anything that the Gaynor News Company did, during your employment with the Gaynor News Company, that strengthened your desire to become a member of the Newspaper and Mail Deliverers Union?

Mr. Bernstein: Same objection.

Trial Examiner: Same ruling.

By Mr. Kass:

Q. Was there anything that the Gaynor News Company did that encouraged you to seek membership in the Newspaper and Mail Deliverers Union?

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[fol. 153] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

No. 231

Argued May 13, 1952 Docket No. 22297

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

GAYNOR NEWS COMPANY, INC., Respondent

OPINION—June 24, 1952

Before Augustus N. Hand, Chase and Frank, Circuit Judges

Petition for enforcement of an order of the National Labor Relations Board. Modified and Enforced as Modified

George J. Bott, David P. Findling, A. Norman Somers, Frederick U. Reel and Louis Schwartz, for petitioner; Bandler, Haas & Kass, for respondent; Vladeck & Elias (Stephen C. Vladeck and Milton Horowitz, of counsel), for Newspaper and Mail Deliverers' Union of New York.

[fol. 154] The facts are stated in the opinion of the Board, reported in 93 N. L. R. B. 299.

FRANK, *Circuit Judge:*

The Board has found the employer-respondent guilty of violating Sections 8 (a)(1)(2) and (3) by (1) retroactively paying wage increases and vacation benefits to union members only, and (2) agreeing to and enforcing an illegal union shop contract in 1948 without first obtaining Board certification that a majority of employees had authorized such an agreement in a union shop election. The employer admits substantially all the facts of both violations, but, on several grounds, defends its actions and repudiates the consequences.

1. It says, first of all, that § 10(b) of the Act prohibits prosecution for refusing the retroactive benefits to anyone

but Loner, the employer who first filed charges. This original charge was later amended—more than six months after the violations charged—to include (a) a charge of the same discriminatory treatment of other non-union employees besides Loner, and (b) a charge that the 1948 contract was illegal and in violation of employees' rights under § 8(a)(1)(2)(3) of the Act. Section 10(b) of the Act reads:

> "No complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

This section has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which "relate back" or "define more precisely" the charges enumerated within the original and timely charge. The "relating back" [fol. 155] doctrine for this purpose has been liberally construed to give the Board wide leeway for prosecuting offenses unearthed by its investigatory machinery, set in motion by the original charge. *N. L. R. B.* v. *Kobritz*, 193 F. (2d) 8, 14-16 (C. A. 1); *Cusano* v. *N. L. R. B.*, 190 F. (2d) 898, 903-904 (C. A. 3); *N. L. R. B.* v. *Kingston Coke Co.*, 191 F. (2d) 563, 567 (C. A. 3); *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. (2d) 413, 415 (C. A. 10). Thus a general allegation in the original complaint that the employer had interfered with employees in the exercise of their § 7 rights by restraining and coercing them, discriminating in regard to hire and tenure and refusing to bargain in good faith, was subsequently—more than six months after the date of the alleged violation—amended to allege discharges of particular employees for legitimate union and strike activities. *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. (2d) 413, 416 (C. A. 10).

We feel that the enlarged complaint can be justified here on the "relating back" theory in so far as the additional victims of the discriminatory treatment are concerned. Here the violation and the facts constituting it remained the same as in the original charge; only the number of those discriminated against was altered. This addition

certainly could not prejudice the employer's preparation of his case, or mislead him as to what exactly he was being charged with. Cf. *N. L. R. B.* v. *Reliable Newspaper Delivery, Inc.*, 187 F. (2d) 547, 550 n. 3 (C. A. 3); *Consolidated Edison* v. *N. L. R. B.*, 305 U. S. 197, 238. The same is true of the additional allegation in the final complaint that action previously categorized as a violation of §§ 8(a)(1) and (3) constituted also a violation of § 8(a)(2). This was only a change in legal theory and not in the nature of the offense charged. *Cusano* v. *N. L. R. B.*, 190 F. (2d) 898, 903 (C. A. 3). As to the charge of illegality concern-[fol. 156] ing the 1948 contract, we agree that, so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer. Since the contract was still in force at the time of filing, the six months' limitation period of § 10(b) had not even begun to operate. See *Superior Engraving Co.* v. *N. L. R. B.*, 183 F. (2d) 783, 790 (C. A. 7); *Katz etc.* v. *N. L. R. B.* (April 21, 1952 (C. A. 9)). The complaint was, then, in all respects valid.

2. This brings us to the substance of the complaint. The employer admits giving union members retroactive wage increases and vacation benefits while denying them to non-union members. It claims, however, that such action had neither the purpose nor the effect required by § 8(a)(3), *i.e.*, to encourage membership in any labor organization; that the Board failed to prove that purpose and effect, and that, therefore, the action cannot be sanctioned. Loner, the original complainant, it is argued, had already unsuccessfully done everything he could to enter this union; his membership application was pending at the time of the violation; nothing the employer could do would amount to further "encouragement" of that membership. The employer relies heavily on *N. L. R. B.* v. *Newspaper Delivery, Inc., supra.* There an employer acceding to the requests of a minority union, bargaining on a members-only basis, gave union members discriminatory advantages over non-union members. The Court held that such discrimination could not have the necessary effect of encouraging union membership because the union was a closed one, with membership passing exclusively from father to son. There is, however, one significant distinction between that case

and this one. There discrimination resulted from what the court considered the entirely legal action of the minority union in asking special benefits for its members [fol. 157] only. The union made no pretense of representing the majority of employees or of being the exclusive bargaining agent in the plant. The other non-union employees, reasoned the Court, were quite able to elect their own representative and ask for similar benefits. Not so here. The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members, by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation.

True, the Third Circuit in the *Reliable* case went on to say that, even assuming unfair discrimination, it was up to the Board to prove that this discrimination had the purpose and effect of encouraging union membership. Several cases, including one of our own, *N. L. R. B.* v. *Air Associates*, 121 F. (2d) 586, 592, were cited there to support this interpretation of § 8(a)(3). But see our explanation of that case in *N. L. R. B.* v. *Cities Service Oil Co.*, 129 F. (2d) 933, 937 (C. A. 2). The Board, on the other hand, here cites *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 800, for the proposition that no statistical proof of an actual "encouraging" effect on union membership need be shown where the discriminatory conduct by its nature "tends to encourage or discourage" union membership. See also *N. L. R. B.* v. *Engelhorn & Sons*, 134 F. (2d) 553, 557 (C. A. 3); *N. L. R. B.* v. *Illinois Tool Works*, 153 F. (2d) 811, 814 (C. A. 7); *N. L. R. B.* v. *Ford et al.*, 170 F. (2d) 735, 738 (C. A. 6).

Our own view comes to this: Discriminatory conduct, such as that practiced here, is inherently conducive to increased union membership. In this respect, there can be little doubt that it "encourages" union membership, by increasing the number of workers who would like to join and/or their quantum of desire. It may well be that the [fol. 158] union, for reasons of its own, does not want new members at the time of the employer's violations and will reject all applicants. But the fact remains that these re-

jected applicants have been, and will continue to be, "encouraged," by the discriminatory benefits, in their desire for membership. This backlog of desire may well, as the Board argues, result in action by non-members to "seek to break down membership barriers by any one of a number of steps, ranging from bribery to legal action." A union's internal politics are by no means static; changes in union entrance rules may come at any time. If and when the barriers are let down, among the new and now successful applicants will almost surely be large groups of workers previously "encouraged" by the employer's illegal discrimination. We do not believe that, if the union-encouraging effect of discriminatory treatment is not felt immediately, the employer must be allowed to escape altogether. If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator. To this extent, we find ourselves in disagreement with the *Reliable* case, and do not hesitate in holding the action here violative of both § (a)(1) (2) and (3).

The employer makes one additional—and feeble—argument, which we speedily reject, based upon the "closed-shop" proviso to the Wagner Act § 8(3), in effect at the time of these violations. That proviso allowed an employer to agree with a union "to require as a condition of employment membership therein." Since discriminatory hiring and firing were thus legal in a closed shop, says the employer, a lesser discrimination—*i.e.*, in retroactive payment of wages, vacation benefits, etc.— was also legal. Reason as well as statutory text disagree. The proviso was a specific exception to what would otherwise have been a violation of the general anti-discrimination rule laid down in old § 8(3). [fol. 159] The purpose of the closed-shop proviso was to permit what was then thought to be a unifying influence in labor relations, *i.e.*, one union representing and supported by all employees bargaining with one employer. No such rational justification for discrimination in working conditions exists; the effect of this kind of discrimination is indisputably discordant, divisive, and conducive to conflict and bad feeling in the plant. We think that Congress never meant, by implication or otherwise, to allow such a patently

unfair and labor-strife-provoking policy in industries under its control.

3. The last point of substance we must consider concerns the alleged violations of § 8(a)(1)(2)(3) stemming from the 1948 contract which contained a union security clause. At that time, no such clause could be executed unless the majority of employees in a Board-conducted union-shop election authorized it. Here, no such election was held. The contract did contain a "saving clause" reprinted in the margin[1]—that, "should * * * any provision of this agreement be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted." The effect of such a clause, however, as the Board noted, was not to defer the application of the union-security provision but only to postpone "the issue of its legality for future determination by some proper tribunal." Very recently, in *N. L. R. B.* v. *Red Star Express Lines* (April 14, 1952), we held that a similar "saving clause"—if anything a more cautious one, providing that [fol. 160] provisions of questionable legality under the 1947 amendments to the Labor-Management Act should not go into effect until held legal—would not suffice to prevent the agreement from constituting an unfair labor practice. Our reason was that an employee cannot be expected to predict the validity or invalidity of particular clauses in the contract, and will feel compelled to join the union where a union-security clause of questionable validity exists, if only as a hedging device against a possible future upholding of the clause. Only a specific provision deferring application of the union-security clause will immunize the contract

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[1] "To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulations. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In the event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect."

against this illegality. The same principles serve to void the union-security provisions here.

As a result of finding the union-security provision illegal, the Board ordered the employer to cease and desist from enforcing this contract or any other with this or any other union, or from recognizing any union's representative status in any way until duly certified by the Board. By these injunctive provisions—§§ 1(b)(c)(d) and 2(b) of the Board's order—the employees lose all their rights under the 1948 contract—wages, hours, benefits, etc.—and are prevented from enforcing any new ones. The illegality in this contract lay solely in the union's failure to secure prior approval from a majority of employees for the union-security clause—a requirement since abolished by Congress in 1951 as burdensome and unnecessary. That approval can no longer be secured at this late date, nor is it necessary to any new contract.

The Board argues that the entire contract must be voided and collective bargaining relations suspended, or otherwise the union will "be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract." The Board also says that the union's present position was illegally advanced by the employer's discriminatory treatment of non-union employees. See *Katz etc.* v. [fol. 161] *N. L. R. B. supra.* Nevertheless we believe the remedy works out too harshly here. The union has asked the Board for consideration of its petition for certification and has been refused, with the advice that no such action will be taken until the Board's order has been fully complied with. Compliance must come from the employer. Meanwhile this or any other union, and consequently all the employees, are in a box and cannot enforce any rights or demands through collective bargaining. The employer, the sole party against whom the Board proceeded, gains through this total lifting of any contractual restraints on its action. The union here involved claims it has entered into a new contract with the employer which, it says, abolished all taint of illegality contained in the earlier one. This the Board does not deny, nor do we pretend to pass on the question here. We do not, however, think that the possible danger to employees of allowing some collective bargaining relations with this union outweighs the substantial

harm to them in taking away for an indefinite period all collective bargaining rights. We have therefore decided to refuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification. If, during this interval, the employer should do or agree to do anything that would illegally discriminate against any employees or in any other way violate the remaining portions of the Board's order, the Board is still free to prosecute the employer for contempt.

Modified. Enforced as modified.

[fol. 162] CHASE (concurring in part and dissenting in part):

I agree with my brothers that the unfair labor practices found were established by the evidence and differ with them only in that I would enforce the order as made by the Board. As was said in *I. A. of M.* v. *National Labor Relations Board*, 311 U. S. 72, 82, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged. National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 271; National Labor Relations Board v. Falk Corp., 308 U. S. 453, 461." Indeed, it is not because the remedy itself is wrong but only because the Board has not acted upon the union's petition for certification, while the unfair labor practices of which the union is in part the beneficiary remain in effect, that my brothers are withholding full enforcement. That seems to be such an unjustifiable interference with the power of the Board to exercise its sound discretion that I cannot subscribe to it.

[fol. 163] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed July 8, 1952

Before Augustus N. Hand, Chase and Frank, Circuit Judges

This Cause came on to be heard upon the petition of the National Labor Relations Board (hereinafter referred to as the Board) to enforce its Order dated February 16, 1951. The Court heard argument of respective counsel on May 13, 1952, and has considered the briefs and the transcript of record filed in this cause. On June 24, 1952, the Court, being fully advised in the premises, handed down its decision enforcing, as modified, the aforesaid Order of the Board. In conformity therewith, it is hereby

Ordered, adjudged and decreed that the Respondent, Gaynor News Company, Inc., Mount Vernon, New York, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization of its employees, by discriminating in regard to the hire and tenure of employment, or any term or condition of employment of any of its employees because of their nonmembership in such organization, or by any like or related conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to join labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended;

[fol. 164] (b) Performing or giving effect to its contract of October 25, 1948, with Newspaper and Mail Deliverers' Union of New York and Vicinity;

(c) Entering into, renewing, or enforcing any agreement

with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires its employees to join, or maintain their membership in, such labor organization as a condition of employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act:

(a) Make whole Sheldon A. Loner and all other non-union employees, who were similarly situated, for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated October 19, 1950, in the section entitled "The Remedy";

(b) Upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Decree;

(c) Post at its plant at Mount Vernon, New York, copies of the notice attached hereto, marked "Appendix A". Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Second Region (New York, New York), shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[fol. 165] (d) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree, what steps the Respondent has taken to comply herewith.

Augustus N. Hand, Judge, United States Court of Appeals for the Second Circuit; Jerome N. Frank, Judge, United States Court of Appeals for the Second Circuit.

[fol. 166] APPENDIX A

Notice to All Employees

Pursuant to a Decree of the United States Court of Appeals Enforcing, as Modified, An Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not encourage membership in Newspaper and Mail Delivers' Union of New York and Vicinity, or any other labor organization of our employees, by discriminating in regard to their hire and tenure of employment, or any term or condition of employment of any of our employees because of their nonmembership in such organization.

We will not enter into, renew, or continue in force and effect any agreement with Newspaper and Mail Deliverers' Union of New York and Vicinity, or any other labor organization, which requires our employees to join, or maintain their membership in, such labor organization, as a condition of employment or continued employment, unless such agreement has been authorized as provided by the National Labor Relations Act, as amended.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join, assist, or form any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the National Labor Relations Act, as amended.

We will make whole Sheldon A. Loner, and all other nonunion employees who were similarly situated, for

any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc. (Employer), by —— —— (Representative), —— (Title).

Dated —— —, ——.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[File endorsement omitted.]

[fol. 167] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 165] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 371

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7100)

any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

Gaynor News Company, Inc. (Employer), by —— —— (Representative), —— (Title).

Dated —— —, ——.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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